Supreme Court, U.S.
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NO. 04 320

In The Supreme Court of the United States

ANTHONY BOST, ET AL.,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the definition of what writing received by EEOC is a "charge" to be determined by the courts based upon the contents of the writing, as prescribed by the regulations of the EEOC, as the Court of Appeals for Fourth Circuit has recently ruled and at least three other circuits have held, or was the court of appeals below correct in ruling that what writing constitutes a charge is determined by the form of the writing used by the charging party, and what EEOC does or does not do after receiving it, and by the "manifest intent" of the charging party, as the court of appeals below has held in dismissing this case, and other circuits have ruled ?

If review is granted, this Court should also resolve the related question of :

2. (a) Does the 1991 Amendment of the Age Discrimination in Employment Act limit the period of limitations to 90 days after a right to sue letter to a charging party alleging a corporate wide pattern or practice of discrimination, as the court of appeals below has held, or was the period of limitations unaffected by that amendment, as the Third Circuit and Second Circuit have held , so that damages rune for a period of at least two years after the discriminatory conduct against that individual occurred ? and b) does the filing of charges and a resulting law suit toll the period of limitations for filing suit for a period of time after the class claims have been resolved or the class decertified and a reasonable period thereafter; as the Second and Third Circuit and other circuits have ruled, or is the period extended only for the period until the date of the last charge alleging a pattern of discrimination on the date of decertification, as the court of appeals below has held in this case ?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Anthony W. Bost, Ronald Clausnitzer, Kathy L. Creamer, Gerald D. Freeman, Mary Ann B. Frost, Ervis Gregory, William Krolman, John Kuenning, Vincent J. Maccia, Dennis J. Majors, Phyllis Nelson, James J. Natalina, Kenny Bosley, Stephen J. Costianes and Curly Chester, individually and on behalf of others similarly situated, by their attorneys, David L. Rose and David M. Wachtel, petition for a writ of certiorari to review the final decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion and final decision of the court of appeals (A-1-16) is reported at 372 F.3d 1223. The order of the district court (A-17-36) is not reported.

JURISDICTION

The final Decision of the court of appeals finally rejecting petitioners' claims was entered on June 8, 2004. (A-17-36). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq., as amended, and the charge filing regulations of the Equal Employment Opportunity Commission ("the Commission" or "EEOC")

under the ADEA[1], 29 C.F.R. 1623, et seq., and under Title VII of the Civil Rights of 1964, as amended, 29 C.F.R. 1601.12, are set forth in Appendix A below, at a-c.

STATEMENT

1. The Basic Facts. Federal Express Corporation ("FedEx") is a corporation engaged in the pick-up and delivery of packages by air and ground. FedEx has thousands of employees called couriers who drive trucks and pick up and deliver such packages in the United States. Petitioners are 15 current or former couriers of FedEx employed in Florida over the age of 40 and each of them has ten or more years of service with FedEx. A-43, 44. Six of them had filed documents with EEOC or authorized state or local agencies from 1996 through 2001 alleging that since late1994 FedEx has followed a company wide pattern and practice of discriminating against experienced older couriers on the basis of age, in favor of younger less experienced couriers. A-46-52.

a. The Bost Administrative Filing. On December 18, 2001, Petitioner Bost made a complaint of age discrimination on a two page Intake Questionnaire (EEOC Form 283) and a six page affidavit and mailed the eight page document to the EEOC. A-67-68. On the Form 283 he provided the address and telephone number of the FedEx station where he works, his name, address and telephone number, and his estimate of the number of employees working at his station ("100 +"). A-67. On the same Form he identified FedEx as the discriminating employer, and he specified the kinds of discriminatory practices FedEx used

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[1] The EEOC has separate charge filing regulations for Title VII and for the ADEA, but the charge filing requirements they describe are identical. See, Stat. App. A below at b-c.

against him and other older couriers because of their age, in favor of younger less experienced couriers, including daily assignments of routes and route timing, and in assignments, discipline and stated that the discriminatory practices against him that the harm he alleged "and any actions and continuing." A-67-69. He alleged that FedEx's discriminatory practices reduced his income and made it more difficult for him to do his work, and that the "continuing actions" have "cost me thousands of dollars and untold emotional distress . . . ." A-68.

The EEOC Form 283 states: "Normally your identity will be disclosed to the organization which allegedly discriminated against you," and asks "Do you consent or not consent to such disclosures?" Bost checked the "consent" box to indicate his consent. A-68

From December 18, 2001, through May 8, 2002, the EEOC did not assign a number to the Bost filing of December 18, 2001, and did not notify FedEx or any state or local government agency of the filing or otherwise take action on it. A-12-13.

b. The Allegations in this Suit. On May 9, 2002, Petitioner Bost and ten (10) other Petitioners (the first eleven listed on page 1 above) filed this suit in the Middle District of Florida. In this "Class Action" Complaint they asserted a federal question under the ADEA, and asserted jurisdiction over the state law claims under 28 U.S.C. 1367. A-43-44.

The Complaint alleges that in 1994, "Federal Express began to adopt practices and policies that were intended to and did operate to reduce the number and percentage of couriers over the age of forty . . . by treating them less favorably than younger couriers...." A-46, paras 10-14. The Complaint also alleged that " . . . employment

practices that discriminate against older couriers and favor younger couriers, as described above, are the prevailing pattern or practice of Federal Express in the United States. A-50-51. "Federal Express has continued to follow that pattern or practice to the present." A-51.

The Complaint further alleges that Plaintiff "Bost brings this suit more than 60 days after he notified the . . . Commission of his charges that Federal Express has been engaged in discriminatory employment practices against older couriers." They also alleged that "unless restrained by order of this Court, defendant will continue to pursue policies that are the same, or similar or related to the policies and practices alleged in this Complaint." A-52. The Complaint alleges that other couriers who are not yet plaintiffs, but are more than 40 years old and have at least ten years of service are situated similarly to plaintiffs. A-53.

Bost executed on June 5, 2002, an executed Form 5 "Charge"containing the same allegations of discriminatory conduct and sent it to EEOC, and asserted that the pattern of age discrimination described was "continuing June, 02." A-71-72

c. The Earlier Administrative Filings.

After attempting to resolve his "allegation of age discrimination" informally within FedEx, Petitioner Freeman on June 6, 1996, filed an Intake Questionnaire and Affidavit, with the "Clearwater Human Relations Department." A-74. He stated on the back of the Form 273 "I believe the 'NEW' check-ride procedure was designed to promote discrimination by management against older workers." A-74-77. His eight page affidavit provided significantly more detail. On July 8, 1996, Petitioner Freeman filed a formal charge. A-80-82. That formal charge, which was drafted by the agency for his signature,

did not make any reference to company wide procedures, or that other older couriers were subject to the same discriminatory conduct. A-80-82.

On September 4, 1997, Petitioner Maccia executed and sent to EEOC a six page Affidavit stating that there was a "radical change" in the policy "orchestrated by Federal Express Corporate headquarters in Memphis, Tennessee to target their older workforce, nationwide!" and "your aging and senior employees rights were violated . . . by management." A-85. FedEx records show the formal charge based upon that charge was filed on Sept. 19, 1997. A-66. On April 8, 1998 Maccia filed a retaliation charge. A-66.

Petitioners Clausnitzer, Creamer, and Krolman also filed charges with EEOC in 1997 and 1998 An earlier charge had been filed by courier Haneline in 1994 or 1995 but he did not act on the right to sue letter issued in 1996. In August or September 1999, the EEOC sent right to sue letters to Petitioners Freeman, Maccia, Clausnitzer, Creamer, and Krolman. A-65-66.

d. Proceedings in the Freeman Suit. On October 26, 1999, Petitioners Clausnitzer, Creamer, Freeman, Krolman, Maccia and Wayne Tate filed suit *pro se* against FedEx and several of its officers and employees. *Freeman et al. v. Federal Express Corporation*, (M.D. Fla. No. 99-cv-2466). A-4.

On September 25, 2000, the district court entered an order in the *Freeman* case dismissing the complaint against all individual defendants "with prejudice" and dismissing "the remainder of the complaint relating" to FedEx without prejudice because "the Complaint, as to" FedEx was "verbose." That order gave the "plaintiffs 20 days in which to file an amended complaint." A-4.

On October 16, 2000, the defendant employer moved for entry of a final judgment under Rule 54(b). D.R. 86. On October 24, 2000, four of the Freeman plaintiffs filed an Interlocutory Appeal, and on November 13, 2000, they filed an Amended Notice of Interlocutory Appeal. D.R. 92. Plaintiffs thereafter filed motions for a stay pending appeal, which the district court denied in January and February, with leave to file an amended complaint. A-33. The court in February extended the time for filing an amended complaint to March 9, 2001.

On or about February 20, 2001, four of the five Petitioners in the *Freeman* case filed a motion for a voluntary dismissal in the court of appeals under Rule 42(b), F.R.A.P.

On March 6, 2001, plaintiffs, represented by their attorney, filed an amended complaint. In that Amended Complaint, five in the Freeman case, and six additional petitioners including Bost, were plaintiffs..

The Court of Appeals for the Eleventh Circuit denied the motion for voluntary dismissal on January 14, 2002, on the grounds that the September 25, 2000 order dismissing all of the plaintiffs' claims because the plaintiffs did not file an amended complaint within the 30 days granted in that order, and it became "final and appealable"on October 23, 2000. On the same day, the Court of Appeals for the Eleventh Circuit affirmed the September 25, 2000 order. The judgment of the court of appeals was entered on January 14, 2002, and issued as mandate on February 12, 2002.

On March 28, 2002, the district court administratively closed the *Freeman* suit and stated that the "Order of 9/25/00 of the Court became final on 10/23/00." A-4.

e. The Filing of the Holowecki Suit. On Monday, April 28, 2002, FedEx couriers from New York, Michigan, California, and other states filed a Complaint in *Holowecki et al v. Federal Express Corp.*, Civ. No. 02Civ. 3355(LMM), S.D.N.Y. that was accepted by the Court and stamped filed a day later. That Complaint alleged a pattern or practice of age discriminatory practices by FedEx throughout the United States, and sought to enforce rights under the ADEA and under state laws.

3. Proceedings in the District Court in this Case.

While this case was pending in the district court, Petitioners Natalina, Bosley, Costianes and Chester consented to join the suit as parties plaintiff.

On July 29, 2002, FedEx filed a motion asserting that "Plaintiffs claims are time barred. Plaintiffs also have failed to exhaust their administrative remedies." Motion and Memo. to Dismiss at 2, and 5-8. App. 176-179. FedEx also argued that "None of the Charges....Can Serve as the Basis for a Collective Action." FedEx Memo at 8-12. While the motion was filed under Rule 12(b)(6), the parties submitted documents in support and in opposition. A-5.

In their memorandum in opposition Petitioners relied upon the language of the Complaint and the Bost filing of December 18, 2001 and the EEOC regulations defining "charge" and argued that Bost's December 18, 2001 filing was a "charge," under the Regulations and the Act. They also relied upon the decision of this Court holding that the regulations of the EEOC are valid, *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); and on the decision after remand, *Edelman v. Lynchburg College*, 300 F.3d 400 (4th Cir. 2002), as well as on decisions of the Eleventh Circuit.

On October 11, 2002, FedEx submitted to the district court a copy of the Memorandum and Order of October 9, 2002 in *Holowecki et al v. Federal Express Corp.*, Civ. No. 02Civ. 3355(LMM). *See above.* Notice of filing of October 11, 2002. That decision relied upon *Novitsky v. American Consulting Engineers, L.L.C.*, 196 F.3d 699 (7th Cir. 1999). No final decision was made in the *Holowecki* case until May 5, 2004, and that case is pending on appeal.

c. The Decision of the District Court. By Order of Sept. 18, 2003 the district court granted the motion to dismiss the complaint with prejudice with respect to Bost, because "This case was filed on May 9, 2002, before any notice to the Defendant. The exhaustion of administrative remedies is what affords the Court subject matter jurisdiction over the proceedings." A-27-28. The district court agreed with "the discussion of this issue in *Novitsky*," *supra*. A-28. The Order of the district court did not discuss the regulations of the EEOC. A 17-36. The Order attempts to distinguish the decision in *Edelman v. Lynchgurgh College, supra*, 300 F.3d 400, on the ground of the lawyers letter to EEOC in that case. A-23.

With respect to the Freeman plaintiffs, the district court recognized that "Plaintiffs continued to pursue their complaint after it was dismissed, and that Defendant was on notice of the class-wide allegations during that time." A 33. The district court ruled however, that "...in this Circuit...an order dismissing the case without prejudice when the plaintiff elects not to amend is a Fed. R. Civ. P. 41(b) adjudication on the merits." A-33.

d. Proceedings in this Court of Appeals. FedEx argued that the Bost filing of December 18, 2001, was not a charge because it had not been served upon FedEx, citing and quoting from *Novitsky*, supra, 196 F.3d at 702-703; and because there were no special circumstances manifesting an

"intent to activate the administrative process." Brief for Appellee FedEx at 22-26.

e. The Decision of the Court of Appeals in this case.

The court of appeals affirmed. A-1-16. It noted that " . . . besides being timely, charges of age discrimination must, at a minimum, 'be in writing and . . . name the prospective respondent and . . . generally allege the discriminatory act(s)'" and that a charge may amended to cure technical defects, to clarify or amplify allegations ..." A-7, quoting from 29 C.F.R. 1626.6 and 1626.8 (see Stat. App b-c). The court of appeals below, however, did not mention that under that EEOC Regulation, any amendment concerning the same or like transactions relates back to the date of the first document received by EEOC from the charging party that meets the minimal requirements for a charge. A-7-9.

In its consideration of the positions of the parties on the timeliness of the Bost filing of December 18, 2001, the court of appeals below did not attempt to square its decision with the charge filing regulations of the EEOC. A-7-13. In reaching its decision on the question of whether the first filing of Bost was a charge, the Court of Appeals below chose not to discuss the decision in *Edelman v. Lynchburg College, supra*, 535 U.S. 106, and chose not to discuss the decision of the Fourth Circuit in *Edelman v. Lynchburg College, supra,* 300 F.3d 400, on remand from that decision, although petitioners had relied on the regulations and both *Edelman* decisions in both courts below. A-7-13. On that issue the court of appeals below discussed only three of its earlier decisions, *Clark v. Coates and Clark, Inc.*, 865 F.2d 1236 (11th Cir. 1989); *Pijnenburg v. West Georgia Health Systems Inc.*, 270 F.3d 1314 (11th Cir. 2001) and *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001). A-7-13. The court of appeals below ruled "as a general matter an

intake questionnaire is not intended to function as a charge" and that "EEOC did not treat Bost's intake questionnaire as a charge of discrimination" and that "This case lacks the exceptional circumstances relied upon by the *Wilkerson* court in concluding that the intake questionnaire in that case was a charge." A-12.

With respect to the *Freeman* Petitioners, the court of appeals below ruled that "Dismissal of a complaint without prejudice does not allow a later complaint to be filed outside the statute of limitations" and that the Complaint in that case "was never properly amended," so those petitioning should have filed an amended complaint no later than Oct. 23, 2000. A-14..

REASONS FOR GRANTING THE WRIT

Under the decision of the court of appeals below, and the "manifest intent" approach it followed, a writing submitted to EEOC by an employee complaining about discrimination by the employer is usually not a "charge" unless it is made on an EEOC Form called a "Charge." A__. The valid regulations of EEOC define a charge based upon its content, and that view has been accepted by the Fourth Circuit and at least three other courts of appeals. This Court should grant review to resovle the conflict among the courts of appeals on this important issue of federal equal employment opportunity law. Rule 10(a).

The Court should grant review to resolve the conflict between those courts of appeals that consider a document to be a "charge" of discrimination to be filed with the EEOC on the date derived by application of EEOC regulations and those that substitute the "manifest intent" rule applied below. The Courts of Appeals for the Fourth, Fifth, Sixth,

Ninth and Tenth Circuits[2] correctly treat the first document received by EEOC as a form, if it identifies the employer and generally describes the discriminatory conduct as provided in the EEOC regulations. The Courts of Appeal for the Eleventh, Third and Eighth Circuits treat a document meeting the standards of the regulations as a filed "charge" only if the EEOC has notified the employer promptly.[3] If EEOC has not notified the employer, the first document is not a "charge" filed with EEOC in those courts unless and until the employee has "manifested an intent to activate an administrative process" - usually, by filing a document on "Form 5" which is named "Charge."

This Court recently ruled that the EEOC charge filing regulations are valid. *Edelman v. Lynchburg College, supra*, 535 U.S. 106. This Court should grant review to resolve the conflict and should direct the courts to follow the valid EEOC regulations and to apply them to the cases before them, because the manifest intent approach is contrary to those regulations, and because, as the Fourth Circuit has ruled, those regulations are binding on

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[2] *Oatis v. Crown Zollerbach Corp.* 398 F.2d 496, 498 (5th Cir. 1968) (Title VII); *Foster v. National Bank*, 857 F.2d 1058 (5th Cir. 1988)(ADEA); *Waiters v. Robert Bosch Corp,*, 683 F.2d 89 (4th Cir. 1982); and *Edelman v. Lynchburg College, supra.*, 300 F. 3d at 404-406; *Thornton v. East Texas Motor Freight Co.*, 497 F.2d 416, 424 (6th Cir. 1974); *Casavantes v. Cal. Stat U.*, 732 F.2d 1141 (9th Cir. 1984); and *B.K.B. v. Maui Police Department*, 276 F.3d 1091, 1101-1102 (9th Cir. 2002); and *Peterson v. Wichita*, 888 F.3d 1307, 1308 (10th Cir. 1989);

[3] *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1988); *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 676 (8th Cir. 1996); *Pijnenburg v. West Georgia Health System, Inc.*, 255 F.3d 1304 (11 Cir.2001).

employers and charging parties, and properly state the law. *Edelman v. Lynchburg College, supra*, 300 F.3d at 404-405.

More than 80,000 private sector charges are filed each year with the EEOC, many of which are also filed with state and local government agencies. FY 2003 Report of the EEOC, at 8. The continuing conflict among the circuits causes inconsistency and confusion among the many Federal, state and local officials who must determine what constitutes a charge and when it is filed; and it causes inconsistency among the courts in determining whether a charge was filed and whether it was timely filed under the federal equal opportunity laws.

The words used are not technical, and the are easy to understand. *See*, the text, Stat. App. A, b-c. The regulations of EEOC should be recognized throughout the country as binding on employers and the courts as well as on EEOC. *Edelman v. Lynchburg College, supra*, 300 F.3d at 404-405.

a. The conflict among the circuits has been recognized by the appellate courts. *Pijnenburg v. West Georgia Health System, Inc., supra*, 255 F.3d at 1305 (11th Cir. 2001);and *Diez v. Minnesota Mining and Manufactory Co., supra*, 88 F.3d at 674-675 and in *B.K.B. v. Maui Police Department, supra*, 276 F.3d at 1102. See fn. 2.

The Court of Appeals for the Eleventh Circuit held below that Petitioner Bost did not file a "charge" in 2001 because he filled out and submitted the requested information on an intake questionnaire form (EEOC Form 283), instead of on a "charge" form (EEOC Form 5) and because EEOC did not promptly notify his employer of that filing. It upheld the dismissal of this action on the ground that no "charge" was filed until Mr. Bost exhibited

"manifest intent" by e making the same kind of allegations of a continuing pattern of discrimination by FedEx on a Form 5 on June 5, 2002, to that document.

The ruling below is in conflict with *Edelman v. Lynchburg College, supra*, 300 F.3d 404-405. In that case, the Court of Appeals for the Fourth Circuit held that a letter submitted to the EEOC was a valid charge under the valid regulation even though the EEOC did not notify the employer promptly, and that a perfecting document under oath would relate back to the date of the first document received by EEOC.

This Court held two years ago without dissent that the charge filing regulations promulgated by EEOC, under Title VII are valid. *Edelman v. Lynchburg College, supra,* 535 U.S. 106. In their Opinion, Justices O'Connor and Scalia note that the charge filing regulation "is binding on all the parties coming before the EEOC, as well as EEOC itself." 535 U.S. *supra* at 123-124. Nothing in the Court's opinion or Justice Thomas' concurrence is to the contrary. On remand from that decision, the Fourth Circuit correctly applied the regulations of the EEOC in holding that a charge is filed when the plaintiff fulfills the requirements of the regulation whether or not EEOC performs its duty to notify and serve the charge on the employer. *Edelman v. Lynchburg College* 300 F.3d at 405-405.

The ADEA and Title VII "share substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 257-358 (1995); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). In light of the remedial purpose of the ADEA, and the fact that both laws involve a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process", this Court has refused to impose unnecessary procedural

hurdles on the charging party into either law. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 123-124 (1988); *Oscar Mayer & Co. v. Evans, supra,* 441 U.S. at 761.

The administrative procedure of the ADEA as amended in 1978 was modeled on the Title VII procedure. *Zipes v. Trans World Airlines, Inc.*,455 U. S. 385, 395, fn. 11 (1982). The ADEA has no definition of the word "charge." See Sec. 11 of the ADEA, 29 U.S.C. 632(a) through (l). Title VII also has no definition of charge, but it does prescribe that the a charge be "in writing" and "under oath." Sec. 706(b), 42 U.S.C. 2000e-(b); *Edelman v. Lynchburg College, supra,* 535 U.S. at 112. However, the ADEA has no provision comparable to Sec. 706(b). In addition, like the Fair Labor Standards Act ("FLSA"), a suit under the ADEA is presumptively a collective action, because of its "opt-in" provision *Sperling v. Hoffman-La-Roche,* 493 U.S. 165 (1988).

The charge filing regulations of the EEOC under the ADEA are consistent with the purposes of the ADEA and with the legislative history of the 1978 amendments to the ADEA which incorporated the charge filing features of Title VII. The Conference Report states: "The conferees intend that the 'charge' requirements will be satisfied by the filing of a written statement that identifies the potential defendant and generally describes the action believed to be discriminatory." H. R. Conf. Rep. 95-950 (March 14, 1978) at 8. This Court has cited that Conference Report as authoritative on the intent of Congress in that amendment on a related subject. *Zipes v. Trans World Airlines, Inc., supra,* 455 U. S. at 395, fn. 11.

Like the defendant in the *Edelman* case on remand, FedEx has identified no evidence that it was harmed by the lack of timely notice from EEOC of the first Bost filing. 300 F.3d at 405, fn. 5, The courts below should have treated the

original Bost filing of December 18, 2001, as a "charge" under Federal equal employment opportunity law, as the Fourth Circuit in the *Edelman* case did on remand. 300 F.3d at 404-405.

b. If Bost had sent EEOC a charge form (Form 5) with the same information contained in his intake questionnaire (Form 283), the court of appeals below would have considered it a "charge." The "manifest intent" approach followed by the court of appeals below and by other courts of appeals depends in large part on which EEOC form an individual uses to supply EEOC with information. If the first filing with the EEOC or one of its cooperating agencies is on any writing other than on a Form 5 the District Court must determine the intent of the charging party. See A-10-13..

The "manifest intent" approach was initially based in part upon the belief that a literal reading of the regulation would raise "serious questions" about its validity under the statute. *Steffen v. Meridian Life Ins. Co., supra*, 859 F.2d at 542-543. This Court has put that question to rest by holding that the Regulation is valid and lawful. *Edelman v. Lynchburg College, supra*, 535 U.S. at 112-118.

The courts of appeals following the "manifest intent" approach have relied primarily upon the practice of EEOC prior to 2002, of frequently not notifying the employer of a filed document that meets the standards of a "charge" under its Regulation until after it receives a formal charge (Form 5) from the charging party. *Pijnenburg v. West Georgia Health System, Inc.*, 255 F.3d 1304 (11th Cir. 2001). In that case brought under Title VII, the court of appeals below

treated the issue as one of "first impression in this Court" [4] and ruled that an Intake Questionnaire is not a charge because a charge "serves two significant functions: (1) notification to the employer that a discrimination charge has been lodged with the EEOC; and (2) initiation of the agency's investigation of the Complaint." 225 F.3d at 1306. Under the manifest intent approach a charge is defined by EEOC's conduct or failure to act, rather than the content of the first document EEOC receives from the charging party. 255 F.3d at 1305-07.

The decision below presumes that EEOC will continue to refuse or fail to follow its own regulations, and its statutory duties to notify the employer or other respondent of the charge "within 10 days" or promptly" after such receipt. Sec. 706 (b) and (e) of Title VII, 42 U.S.C. 2000e-5(b) and (e);and Sec. 4(d) and (e) of the ADEA, 29 U.S.C. 626(d) and (e), quoted below at Stat. App. a

The proper assumption about the conduct of federal government officials or agencies is one of the regularity. *U.S. Postal Service v. Gregory*, 534 U.S. 1, 10 (2001), and cases cited. Now that the law has been clarified by the decision of this Court in *Edelman v. Lynchburg College, supra*, the appropriate presumption is that the EEOC will follow its statutory obligations, and serve notice promptly

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[4] That decision does not discuss its prior decision under the ADEA in *Clark v. Coates & Clark*, 865 F.2d 1237 (11th Cir., 1989) which expressly held that the intake questionnaire was a charge because the EEOC regulations were applicable and lawful. 865 F.2d at 1239-41. The court in *Pijnenburg* did not discuss the applicable decisions of the Fifth Circuit in *Oatis v. Crown Zollerbach Corp., supra* 398 F.2d at 498; *Dent v. St. L. & S.F. Ry.*, 406 F.2d 399, 403 (5th Cir. 1969) 225 F.3d 1304. See *Bonner v. Pritchard*, 661 F.2d 1206, 1209.

after the first document constituting a charge under the Regulation has been filed. *U.S. Postal Service v. Gregory, supra*, 534 U.S. at 10 and cases cited.

The "manifest intent" approach requires an assessment by judges and/or juries of the intent of each potential plaintiff who files his first document on some paper other than a formal "charge" form (EEOC). The judges and/or juries are obliged to consider what the charging party and EEOC personnel said to each other, and "how the EEOC responded to the completed questionnaire." *Wilkerson v. Grinnell Corp., supra*, 270 F.3d at 1321; *Downs v. Volkswagen of America, Inc.*, supra, 41 F.3d at 1138.

Questions of intent in judicial proceedings involve the assessment by judges or juries of what is in the mind of another person. *Reeves v. Sanderson Plumbing Products, Inc.*, 535 U.S. 133 at 141-154 (2000) (discriminatory intent under the ADEA); and *Pullman Standard v. Swint*, 456 U.S. 273, 285-290 (1982) (same under Title VII). The manifest intent approach causes unproductive work for lawyers and judges and possibly for juries.

If this Court rules, as we believe it should, that the plain language of the regulations governs, and the courts should apply the regulations to the documents before them, EEOC will be better able to provide the employer or other respondent with prompt notice of the first filing and to conduct an investigation as soon as possible after receipt of that document.

2. A class complaint tolls the applicable statute of limitations for "all asserted members of the class" until those claims have been resolved because it "'notifies the defendants not only of the substantive claims being brought but also of the number and generic identities of the

potential plaintiffs....'" *Crown, Cork & Seal Co. v. Parker, supra*, 362 U.S. at 354. The decisions of the Court of Appeals for the Eleventh Circuit [5] are in conflict with the decisions of the Court of Appeals for the Third Circuit, as that Court has recognized, and the Court of Appeals for the Second Circuit. *McKowan Low & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 384-889 (3d Cir. 2001) and *Sperling v. Hoffman-Laroche*, 24 F.3d 463m 468-472 (3d Cir. 1994). *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058-1060 (2d Cir. 1990), cert. den. 499 U.S. 2077. The decisions of the court of appeals below also appear to be in conflict with the reasoning of the courts of appeals for the Sixth and Tenth Circuits. *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 195 (6th Cir. 1995); *Foster v. Ruhrpumpen, Inc.* 365 F.3d 1191, 1194-99 (10th Cir. 2004).

While the Third Circuit and the Second Circuit provide tolling for members of the class for at least 30 days after the initial class claim is denied, the Eleventh Circuit has ruled that the filing of the class charge does not toll the period of limitations beyond the date of filing of the last notice alleging discrimination against the class. See, fn 5 below.

The ADEA expressly authorizes employees to bring collective actions, and a suit thereunder on behalf of the plaintiff and "other persons similarly situated is a collective action unless and until the district court orders that other older workers are not entitled to opt in. *Sperling v. Hoffman-LaRoche, supra*, 493 U. S. at 170.

In adopting the ADEA Congress incorporated some provisions of the FLSA, but did not incorporate Section 7.

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[5] *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994) and *Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208, 1224 (11th Cir. 2001)(ADEA).

Sperling v. Hoffman-Laroche, 24 F.3d 463, 470-472. (3d Cir. 1994), citing and relying upon the text of the ADEA and H.R. Rep. No. 102-40(i), 102d cong., 1st Sess at 1, and *Trans World Airline v. Thurston*, 469 U.S. 111 (1985); and *Crown Cork & Seal Co. v. Parker*, *supra*. The Third Circuit expressly noted that its rationale is not weakened by the 1991 amendment to 29 U.S.C. 636(3) of the ADEA. That Court also recognized that its decision was contrary to that in *O'Connell v. Champion*, 812 F.2d 393 (8th Cir. 1987).

Similarly, where there are two consecutive actions under the ADEA, and the class is thereafter limited or decertified, the charges and the law suit put the employer on notice of the class wide allegations of age discrimination, and therefore toll the period of limitations until the collective action has been decertified, or limited to exclude the individuals in question, and a period thereafter. *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d at 1057-58. Accord: *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1197-1198 (10th Cir. 2004).

The Second Circuit reasoned that it would serve no administrative purpose to require the filing of repetitive ADEA charges any more than repetitive Tile VII charges, citing and quoting from *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 407, 498 (5th Cir. 1968). *Tolliver v. Xerox Corp.*, *supra*, 918 F.2d 1057-58.

The court of appeals for the Eleventh Circuit holds under the ADEA that the "forward scope of an opt-in class ends on the date the representative charge is filed." *Hipp v. Liberty National Life Ins. Co.*, *supra*, 252 F.3d 1208, 1224-25 (11th Cir. 2001). Moreover, the Eleventh Circuit has ruled that 1991 amendment to 29 U.S.C. 626(e) the ADEA statute of limitations from two or three years after the events in question to a period of ninety days after the receipt of notice of a right to sue charge. *Armstrong v.*

Martin Marietta Corp., 138 F.3d 1374, 1379 (11th Cir. 1998).

Those rulings are we believe in conflict with the holdings of the Third Circuit and the Second Circuit cited above. *McKowan Low & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2001). See also *Catholic Social Services Inc. et al. v. Immigration and Naturalization Service*, 232 F.3d 1139 (9th Cir. 2000).

The tolling period should not end until the trial court order "becomes final by the running of the time during which an appeal may be taken or the entry of a final judgment on appeal." *Burnett v. New York Central R. Co., supra*, 380 U. S. at 426-435.

If review is granted, the Court should resolve this issue.

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully submitted,

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APPENDIX A
STATUTE AND REGULATION INVOLVED

1. The Age Discrimination in Employment Act, 29 U.S.C. 621, et seq. provides in pertinent part:

Section 4, 29 U.S.C. § 623, provides:

(a) Employer practices
It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

Section 7, 29 U.S.C. § 628(c),(d) and (e) provides in pertinent part::

(c) .....

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under the Act.

(2) In any action brought under paragraph (1), a person shall be entitled to a trial by jury ...

(d) ....

No civil action may be commenced by an individual under this section until 60 days after a charge alleging

unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such charge shall be filed.....

(2) in a case to which section 14 of this Act applies, within 300 days after the alleged unlawful practice occurred....or within 30 days after notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge the Commission shall promptly notify all persons named in the charge as prospective defendants and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. civil action may be brought under this section....within 90 days ... of receipt of such notice.

(e).....If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person... against the respondent named in the charge within 90 days after the date of receipt of such notice.

Sec. 14(a) and (b), 29 U.S.C. § 633, provides in pertinent part::

(a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action."

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age....no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been

commenced under State law, unless such proceedings have been earlier terminated.....If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceedings is based, the proceeding shall be deemed to have commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state authority.

2. The charge filing regulation of the U.S. Equal Employment Opportunity Commission ("EEOC") under the ADEA provides:

a. 29 C.F.R. §1626.3 provides:

For purposes of this part, the term "the Act" shall mean the Age Discrimination in Employment Act of 1967, as amended; the "Commission" shall mean the Equal Employment Opportunity Commission or any of its designated representatives; "charge" shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act;....and "respondent" means the person named as a prospective defendant in a charge or complaint, or as a result of a Commission-initiated investigation.

b. 29 C. F. R. §1626.6 provides:

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing

c. 29 C.F.R. §1626.8(a), (b) and (c) provide

(a) In addition to the requirements of §1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of §1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

3. The charge filing regulation of the EEOC under Title VII of the Civil Rights Act of 1964, as amended,

(hereafter "Title VIII "), 29 C.F.R. 1601.12, states in pertinent part:

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in §1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See §1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of...A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments ...related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

APPENDIX [PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[DATE STAMP
FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 8, 2004
THOMAS K. KAHN
CLERK]

No. 03-13408

D.C. Docket No. 02-00837-CV-T-17-MSS

ANTHONY W. BOST,
individually and on behalf
of others similarly situated,
RONALD CLAUSNITZER,
individually and on behalf
of others similarly situated, et al.,

Plaintiffs-Appellants,

versus

FEDERAL EXPRESS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(June 8, 2004)

Before ANDERSON, HULL and PRYOR, Circuit Judges.

PRYOR, Circuit Judge:

The main issue in this appeal is whether an EEOC intake questionnaire and affidavit satisfy the requirements of an EEOC charge when these documents state that they are for "pre-charge filing counseling," the EEOC does not treat them as a charge, and the employee later files a timely charge. We conclude, in this circumstance, that the intake questionnaire and affidavit do not constitute an EEOC charge because these forms would not have suggested to a reasonable person that the employee who completed them had yet manifested an intent to activate the administrative process. Accordingly, we affirm the judgment entered against Anthony Bost whose complaint was premature, because it was filed after his intake questionnaire and affidavit but before his formal charge. We also affirm the judgment entered against the employees on all other issues raised in this appeal.

I. BACKGROUND

The multiple categories of plaintiffs and their repeated forays into litigation complicate this appeal. The plaintiffs are numerous former and current employees of the defendant, some of whom filed formal EEOC charges and others who did not, and several of the employees were named plaintiffs to an earlier lawsuit that was dismissed and affirmed on appeal. To understand the issues in this appeal, a brief overview of the categories of employees and the history of their earlier lawsuit and this litigation is necessary.

A. The Plaintiffs

Former and current employees of Federal Express Corporation (FedEx) sued FedEx and alleged violations of the Age Discrimination in Employment Act (ADEA), 29

U.S.C. sections 621-634, and the Florida Civil Rights Act (FCRA), Fla. Stat. Ann. sections 760.01-760.11. Their putative class action alleged that from late 1994 through the present, FedEx engaged in a pattern and practice of discrimination against older couriers. Five of the named plaintiffs, Ronald Clausnitzer, Kathy Creamer, William Krollman, Gerald Freeman, and Vincent Maccia, were plaintiffs in an earlier case, *Freeman, et al. v. Federal Express Corp.*, Civ, 99-2466-T-30B, that was dismissed by the district court and affirmed by this Court. The plaintiffs in *Freeman* filed a total of seven charges of discrimination against FedEx, beginning on July 8, 1996, until April 15, 1998. The EEOC dismissed all of the charges and issued right-to-sue letters between June 22, 1999, and September 15, 1999.

Five other named plaintiffs, Mary Anne Frost, Ervis Gregory, John Kuenning, Denny Majors, and Phyllis Nelson, did not file any charge with the EEOC. These employees, among others, first filed an amended complaint in the *Freeman* litigation while the dismissal of that suit was pending before this Court.

Anthony Bost also was among those who filed an amended complaint in Freeman while that case was on appeal, but Bost, unlike the others, filed an EEOC charge. Bost first filed an intake questionnaire and affidavit with the EEOC on December 18, 2001, and then filed a formal charge with the EEOC on June 5, 2002. In his responses to the intake questionnaire, Bost alleged that FedEx discriminated against him and other older couriers because of their age. Bost included his full name, address, and telephone number, as well as the name, address, and telephone number of FedEx. Bost signed the questionnaire on December 18, 2001. Bost attached a six-page affidavit alleging instances of discrimination and harassment. On the sixth page of the affidavit, Bost

signed his name under oath in the presence of a notary. Bost filed a formal charge of discrimination a month after the filing of this putative class action. The EEOC issued Bost a notice of right to sue on August 28, 2002.

Four other current employees, James Natalina, Kenny Bosley, Stephen Costianes, and Curlie Chester, consented to join this suit as party plaintiffs after the filing of the complaint. Because they did not provide the district court with proof of filing EEOC charges, none of these plaintiffs presumably filed a charge with the EEOC.

B. Procedural History

The *Freeman* plaintiffs first filed suit, *pro se*, against FedEx on October 26, 1999. The district court dismissed the complaint without prejudice on September 25, 2000, and instructed the plaintiffs to amend their complaint within 20 days or by October 23, 2000. The *Freeman* plaintiffs elected to file a notice of interlocutory appeal on October 24, 2000, and an amended notice of interlocutory appeal on November 13, 2000. On January 14, 2002, this Court concluded that the dismissal of the complaint was final because an amended complaint had not been filed within the required time. This Court also issued an order summarily affirming the dismissal of the *Freeman* suit. *See Freeman v. Federal Express Corp.*, 31 Fed. Appx. 929 (11th Cir. 2002). The district court then issued an administrative order on March 28, 2002, at the request of FedEx, explaining that its September 25, 2000, order of dismissal became final on October 23, 2000, because the *Freeman* plaintiffs did not file an amended complaint by that date. The district court concluded that all filings after October 23, 2000, including the amended complaint of Bost and others, were void.

On May 9, 2002, the plaintiffs in this appeal filed a complaint against FedEx and, as in *Freeman*, alleged violations of the ADEA and the FCRA. On July 29, 2002, FedEx filed a motion to dismiss with prejudice and attached a declaration with nine exhibits to this motion. The employees responded with two memoranda of law and numerous exhibits. The district court granted the motion to dismiss on the grounds that the *Freeman* plaintiffs' complaints were barred by res judicata, and the Bost complaint was premature because it was filed before the EEOC charge. The district court also dismissed the state law claims with prejudice as to all plaintiffs. The employees filed a motion to alter or amend the judgment on March 4, 2002, and a supplemental motion to alter or amend on March 24, 2003. The district court denied both motions on May 5, 2003. The employees filed a third motion to alter or amend the May 2003 order, and the district court also denied that motion. The employees now appeal.

II. STANDARD OF REVIEW

Although the district court granted a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), both FedEx and the employees filed numerous declarations and exhibits in the district court in support of their arguments. Because the parties and the court relied on documents outside the pleadings, the district court was required to treat the motion to dismiss as a motion for summary judgment. *See* Fed.R.Civ.P. 12(b); *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985) ("once the court decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment").

We review an order granting summary judgment *de novo,* applying the same standards as the district court. *See Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1357 (11th Cir. 1999). Summary judgment is only appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). A genuine issue of material fact exists "if the jury could return a verdict for the non-moving party." *Damon*, 196 F.3d at 1358 (quoting *United States v. Four Parcels of Real Property,* 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc)). In examining the record, we view the evidence in the light most favorable to the non-moving party. *See id.* at 1358.

We review for abuse of discretion the denial of the employees' motion to alter or amend the judgment, which pertained to the dismissal with prejudice of the claims brought under state law. *See Am. Home Assurance Co. v. Glenn Estess & Assoc., Inc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985) (citing *Futures Trading Comm'n v. Am. Commodities Group,* 753 F.2d 862, 866 (11th Cir. 1984); *McCarthy v. Mason*, 714 F.2d 234, 237 (2d Cir. 1983); *Weems v. McCloud*, 619 F.2d 1081, 1098 (5th Cir. 1980)).

III. DISCUSSION

Our main focus is on the plaintiffs' claims under the ADEA. The named plaintiffs are divided into two separate categories regarding their ADEA claims: (1) those who base their claims on a charge filed by Bost (the Bost plaintiffs); and (2) those who base their claims on charges filed by the plaintiffs in the *Freeman* litigation (the Freeman plaintiffs). We first address the ADEA claims of the Bost plaintiffs, and we next address the

ADEA claims of the Freeman plaintiffs. Finally, we address the plaintiffs' state law claims.

A. ADEA Claims

The ADEA requires that an individual exhaust available administrative remedies by filing a charge of unlawful discrimination with the EEOC before filing a lawsuit. *See* 29 U.S.C. § 626(d)(2); *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1291 (11th Cir. 2002). For a charge to be timely in Florida, a deferral state, it must be filed not more than 300 days after the alleged unlawful employment practice occurred. *See id.; Maynard v. Pneumatic Prods. Corp.*, 256 F.3d 1259, 1263 (11th Cir. 2001). The employee must then wait at least 60 days before filing a civil action. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1100 (11th Cir. 1996) (an employee may sue before the EEOC issues a right-to-sue letter under the ADEA); *see also* 29 U.S.C. § 626(d). If the EEOC issues the employee a right-to-sue letter, the employee must file a complaint within 90 days of the receipt of the right-to-sue letter. *See Santini v. Cleveland Clinic Fla.*, 232 F.3d 823, 825 (11th Cir. 2000).

Besides being timely, charges of age discrimination must, at a minimum, "be in writing and ... name the prospective respondent and ... generally allege the discriminatory act(s)." 29 C.F.R. § 1626.6. A charge "should contain" certain other information, including the full name, address, and telephone number of the charging party, full name and address of the employer, a clear and concise statement of the alleged unlawful discrimination including pertinent dates, and the approximate number of employees. *See* 29 C.F.R. § 1226.8(a)(1)-(5). Even if a charge does not contain the suggested information, however, the EEOC considers the charge sufficient when

the EEOC receives from the charging party "a written statement or information reduced to writing . . . that conforms to the requirements of § 1626.6." 29 C.F.R. § 1626.8(b); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1240-41 (11th Cir. 1989). A charge may be amended to cure technical defects, to clarify or amplify allegations, or to allege additional unlawful acts. *See* 29 C.F.R. § 1626(c).

The filing of a charge of discrimination with the EEOC initiates "an integrated, multi-step enforcement procedure" that enables the EEOC to detect and remedy various discriminatory employment practices. *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 62, 104 S.Ct. 1621, 1627 (1984). This process includes the following steps: (1) prompt notice from the EEOC to the employer that a charge has been filed; and (2) investigation of the charge by the EEOC. *See Shell Oil Co.*, 466 U.S. at 63, 104 S.Ct. at 1628. The EEOC assumes the burden of "promptly notify[ing] the respondent that a charge has been filed." 29 C.F.R. § 1626.11.

Ordinarily every employee who intends to sue for age discrimination must first file an administrative charge of discrimination with the EEOC. Under the "piggybacking rule," a putative plaintiff who has not filed an EEOC charge, however, may rely upon the claim of a plaintiff who has filed a timely charge. *See Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001); *Grayson*, 79 F.3d at 1101; *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 450 (11th Cir. 1993). The piggybacking rule applies to ADEA cases. *See Grayson*, 79 F.3d at 1101. A plaintiff may piggyback on another plaintiff's charge provided "(1) the relied upon charge is not invalid, and (2) the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame." *Id.* at 1101-02 (quoting *Calloway*, 986 F.2d at 450).

1. The Bost Plaintiffs

Bost and eight non-filing employees, Clausnitzer, Freeman, Kuenning, Majors, Natalina, Bosley, Costianes, and Chester, base their ADEA claims on an EEOC charge filed by Bost. The Bost plaintiffs either are current employees, as is Bost, or were terminated after the filing of Bost's charge of discrimination. If Bost's charge of discrimination was premature, the other plaintiffs cannot piggyback on his charge.

The district court dismissed the ADEA claims of the Bost plaintiffs as premature because the suit was filed on May 9, 2002, nearly a month before Bost filed his formal EEOC charge on June 5, 2002. The Bost plaintiffs contend that Bost's EEOC charge was filed on December 18, 2001, when Bost filed an intake questionnaire and affidavit. The Bost plaintiffs argue that Bost's charge was not premature because he filed the intake questionnaire and affidavit five months before the commencement of this suit.

In evaluating the argument of the Bost plaintiffs, we are guided by three of our precedents. This Court first considered whether an intake questionnaire constitutes an EEOC charge in *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989). In *Clark*, the plaintiff contacted the EEOC after his termination and inquired about the appropriate procedures for filing a charge of discrimination. *Id.* at 1239. The EEOC sent Clark an intake questionnaire that he completed and returned 152 days after his termination. *Id.* After receiving the questionnaire, the EEOC sent a notice of a charge of discrimination to his employer. *Id.* Clark then signed a formal charge prepared by the EEOC 202 days after his termination. *Id.* at 1239-40. The employer argued that because the formal charge was not filed within the

required 180 days, Clark's claims were barred. *Id.* at 1240. Clark argued, however, that his intake questionnaire satisfied the filing requirement of 29 U.S.C. § 626(d)(1). *Id.*

This Court agreed with Clark and held that his informal intake questionnaire "fulfilled all of the objectives desired by Congress" because it was "in writing and described the action which Clark believed to be discriminatory." *Id.* at 1241. This Court concluded that the EEOC treated Clark's intake questionnaire as a charge. The EEOC notified the defendant of the alleged discrimination after receipt of the intake questionnaire, but before completion of the formal charge. *Id.* at 1240-41.

This Court next addressed whether an intake questionnaire served as a charge in *Pijnenburg v. West Georgia Health Systems, Inc.*, 255 F.3d 1304 (11th Cir. 2001). Pijnenburg sued her employer for sex discrimination and retaliation. *Id.* at 1305. She completed an "Interview Questions for Employment Discrimination" form and filed it with the EEOC within 180 days of the alleged discrimination. *Id.* The form was not sworn. *Id.*

This Court held that "as a general matter an intake questionnaire is not intended to function as a charge" for purposes of the statute of limitations, and this Court concluded that Pijnenburg's questionnaire was not an exception to that general rule. *Id.* at 1307. This Court reasoned that, unlike the filing of the questionnaire, a charge, in addition to triggering the running of the statute of limitations, serves the following two functions: (1) notification to the employer that a discrimination charge has been filed with the EEOC; and (2) initiation of the EEOC investigation of the complaint. *Id.* at 1306. The *Pijnenburg* court concluded that the filing of Pijnenburg's

intake questionnaire did not satisfy either of these two functions, and the treatment of her questionnaire as a charge would have thwarted these two objectives. *Id.*

Most recently, this Court held that a verified intake questionnaire that included the basic information suggested by the EEOC may constitute a charge for purposes of the statute of limitations "when the circumstances of the case would convince a reasonable person that the charging party manifested her intent to activate the administrative process." *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1321 (11th Cir. 2001). Those exceptional circumstances were present in that appeal. This Court cautioned, however, that it would "not treat intake questionnaires willy-nilly as charges." *Id.* at 1320.

In holding that the intake questionnaire satisfied the requirements of an EEOC charge, the *Wilkerson* Court considered the following three factors: (1) the communication between the plaintiff and the EEOC; (2) the EEOC intake questionnaire form itself; and (3) the response by the EEOC to the completed questionnaire. *Id.* at 1320-21. As to the first factor, Wilkerson contacted the EEOC multiple times regarding her charge, and she received misleading information from the EEOC. *Id.* at 1320. Second, the questionnaire form itself stated that it could be a charge. *Id.* at 1320-21. Finally, after some prodding by the plaintiff, the EEOC treated her questionnaire as a charge and issued a belated notice of the charge to her employer. *Id.* at 1321. In those exceptional circumstances, we held that Wilkerson's intake questionnaire satisfied the requirements of a charge, which allowed Wilkerson to proceed with her complaint. *Id.*

The facts of this case differ significantly from these earlier cases. Unlike in *Clark*, the EEOC did not treat Bost's intake questionnaire as a charge of discrimination. There is no evidence in the record that the EEOC did anything in response to Bost's intake questionnaire and affidavit. The EEOC did not send a notice of a charge to FedEx, as it did in *Clark*. Instead, the EEOC sent notice of a charge of discrimination only after Bost filed his formal charge in June 2002. The record reveals no evidence that the EEOC considered the questionnaire to be a charge of discrimination.

This case lacks the exceptional circumstances relied on by the *Wilkerson* Court in concluding that the intake questionnaire in that case was a charge. There is no evidence that Bost manifested an intent to activate the administrative process by filing his intake questionnaire with the EEOC, as *Wilkerson* required. The undisputed evidence instead shows the opposite; Bost clearly understood that the intake questionnaire was not a charge because he later filed a timely charge. If Bost believed that he had filed a charge of discrimination when he filed the intake questionnaire, he would not have filed an additional timely charge of discrimination. Bost's conduct shows that he did not intend to activate the administrative process until he filed his formal charge of discrimination.

Unlike the series of statements made by the EEOC to the plaintiff in *Wilkerson*, there is no evidence of any misleading communication between Bost and the EEOC. Bost has not alleged that he contacted the EEOC to inquire about his alleged charge nor that the EEOC instructed him in any way about his intake questionnaire. The EEOC notified FedEx of Bost's charge and then issued Bost a right-to-sue letter only after Bost filed his formal charge.

Finally, the questionnaire form itself did not suggest that it was a charge. The Privacy Act Statement at the end of the intake questionnaire instead stated that the questionnaire was not the equivalent of a charge of discrimination. The Privacy Statement described the form as a means to decide whether the EEOC has jurisdiction over "potential charges" and to provide "pre-charge filing counseling." These descriptions suggest to a reasonable reader that the questionnaire was not a charge.

Thus, Bost's intake questionnaire did not satisfy the requirements of a charge of discrimination. We reiterate that "an intake questionnaire is not intended to function as a charge." *Pijnenburg*, 255 F.3d at 1307. This Court will "not treat intake questionnaires willy-nilly as charges." *Wilkerson*, 270 F.3d at 1320.

Bost should have waited the required 60 days after he filed his formal charge of discrimination to file his lawsuit. He also could have filed suit within 90 days of receiving his notice of a right to sue from the EEOC. Instead, Bost filed his lawsuit before either of these events and impermissibly bypassed the administrative process. As a result, the ADEA claims of the Bost plaintiffs fail.

2. The Freeman Plaintiffs

Six of the employees – Creamer, Frost, Gregory, Krollman, Maccia, and Nelson – base their ADEA claims on the EEOC charges from the *Freeman* suit. The Freeman plaintiffs were employed by FedEx when the named plaintiffs in *Freeman* filed their charges of discrimination. If the charges of the named plaintiffs in *Freeman* were untimely, these plaintiffs would not be entitled to piggyback on the charges.

The district court concluded that the Freeman plaintiffs waited too long after the dismissal of *Freeman* to file a new action based on those charges. The Freeman plaintiffs maintain, however, that the statute of limitations for filing the current action was tolled until March 28, 2002, the date they contend that the *Freeman* litigation ended, and this action was filed on May 9, 2002, less than 90 days later.

The EEOC issued the last right-to-sue letter to any of the plaintiffs in *Freeman* on September 15, 1999. On September 25, 2000, the district court dismissed *Freeman* without prejudice and instructed the plaintiffs to amend their complaint by October 23, 2000. They instead elected to appeal the dismissal and order to amend. The involuntary dismissal without prejudice thus became an adjudication on the merits when the time to amend expired on October 23, 2000. *See Robinson v. Fed. Nat'l Mortgage Ass'n*, 673 F.2d 1247, 1249 (11th Cir. 1982). We affirmed the judgment, and the *Freeman* complaint was never properly amended. On March 28, 2002, at the urging of FedEx, the district court issued an administrative order confirming that the dismissal without prejudice from September 2000 had become an adjudication on the merits in October 2000.

Under the ADEA, an employee has 90 days after obtaining a right-to-sue letter to file an action. *See Santini,* 232 F.3d at 825. Dismissal of a complaint, without prejudice, does not allow a later complaint to be filed outside the statute of limitations. *See Stein v. Reynold Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982). That period elapsed before the Freeman plaintiffs filed their new complaint.

The Freeman plaintiffs contend that the running of the 90-day period for filing an action should be tolled

until March 28, 2002. We disagree. All claims in *Freeman* were resolved on October 23, 2000, when the time to amend expired. The statute of limitations began to run then. This action, however, was not filed until May 9, 2002, 604 days later.

Although a court may equitably toll a limitations period, the plaintiffs must establish that tolling is warranted. *See Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993). Equitable tolling is inappropriate when a plaintiff did not file an action promptly or failed to act with due diligence. *See id.* Equitable tolling "is an extraordinary remedy which should be extended only sparingly." *Id.* The Freeman plaintiffs fail to explain why they did not file an amended complaint in *Freeman*, as the district court directed, nor have they explained why we should apply the doctrine of equitable tolling to revive their complaint. The claims of the Freeman plaintiffs, therefore, fail.

B. State Claims

All of the employees contend that the district court erred by dismissing their state law claims with prejudice. They argue that the statute of limitations for the state claims should have been tolled, preventing dismissal. They also argue that the court should have dismissed the state claims without prejudice if the court believed those claims were not properly before it.

The employees failed to raise this argument before the district court either in their two responses to the motion to dismiss or in their Rule 59 post-judgment motion to alter or amend the ruling of the district court. They first challenged the dismissal of the state claims in a supplemental motion to alter or amend judgment. The court then refused to alter or amend its judgment based

on an argument that could have been presented earlier but was not. *See Am. Home Assurance Co.*, 763 F.2d at 1238-39. "There is a significant difference between pointing out errors in a court's decision on grounds that have already been urged before the court and raising altogether new arguments ...; if accepted, the latter essentially affords a litigant 'two bites at the apple.'" *Id.* at 1239. The district court properly exercised its discretion by declining to alter or amend its judgment based on the employees' new contention regarding the state claims.

IV. CONCLUSION

Bost's intake questionnaire was not a charge of discrimination because Bost did not manifest an intent to activate the administrative process until he filed a formal charge. Bost's complaint, which preceded his formal charge, was premature. The ADEA claims of Bost, Clausnitzer, Freeman, Kuenning, Majors, Natalina, Bosley, Costianes, and Chester, therefore, fail. The ADEA claims brought by those employees who relied on the charges from *Freeman* – Creamer, Frost, Gregory, Krollman, Maccia, and Nelson – also fail because the statute of limitations had expired. The Freeman plaintiffs filed their complaint 604 days after the statute of limitations of 90 days began to run. Finally, the district court did not abuse its discretion by declining to consider a new argument first made in the plaintiffs' motion to alter or amend its judgment dismissing the plaintiffs' state law claims with prejudice.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[DATE STAMP
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TAMPA, FLORIDA]

ANTHONY W. BOST, et a1.,
Plaintiffs,

vs. CASE NO. 8:02-CV-837-T-17MSS

FEDERAL EXPRESS CORPORATION,
Defendant.

ORDER

This cause is before the Court on:

Dkt. 7 Motion to dismiss with Prejudice
Dkt. 13 Response with Exhibits 1-9
Dkt. 14 Reply
Dkt. 17 Additional Exhibits

This case is an age discrimination case, brought under the ADEA, 29 U.S.C. Sec. 626(d), for alleged discriminatory acts which occurred in 1994 and thereafter. Plaintiffs allege that Defendant adopted policies and practices which favored younger couriers over older couriers. The case was filed on May 9, 2002. There are eleven Plaintiffs. Some Plaintiffs are current employees of Defendant, and some are former employees.

The Court notes that Plaintiffs Freeman, Maccia, Clausnitzer, Creamer, and Krolman filed another case

based on the same allegations of age discrimination in this Court (Case No.: 99-CV-2466-T-30TGW) (Freeman I). The case was filed on Oct 6, 1999. The case was dismissed without prejudice due to noncompliance with Fed.R.Civ.P. 8, and Plaintiffs appealed. The dismissal was affirmed on appeal on January14, 2002.

Defendant has filed a Motion for Dismiss this case. Defendant argues that the 90 day statute of limitations under the ADEA has expired, Plaintiffs' claims are time-barred, and Plaintiffs have not exhausted their administrative remedies. Defendant requests a dismissal with prejudice.

The following Plaintiffs have filed a charge of discrimination with the EEOC:

Anthony W. Bost

Plaintiff alleges he filed a charge with the EEOC on December 18, 2001 (Dkt. 9, 13). He is a current employee. Defendant alleges Plaintiff Bost filed a charge on June 5, 2002.

Ronald Clausnitzer

He filed a charge with the EEOC on September 22, 1997, and on March 26, 1998. The Notice of Right to Sue is dated August 2, 1999. (Dkt. 7, Exhibits). He is a current employee.

Kathy L. Creamer

She filed a charge with the EEOC on October 6, 1997. The Notice of Right to Sue is dated August 2, 1999. (Dkt. 7, Exhibits). She is a former employee, as of 7/9/1997.

Gerald D. Freeman

He filed a charge with the EEOC on July 8, 1996. The Notice of Right to Sue is dated September 15, 1999. (Dkt. 7, Exhibits). He is a current employee.

William Krolman

He filed a charge with the EEOC on December 29, 1997. The Notice of Right to Sue is dated June 22, 1999. (Dkt. 7, Exhibits). He is a former employee, as of 4/7/1997.

Vincent J. Maccia

Plaintiff Maccia filed a Charge with the EEOC on September 19, 1997 and on April 15, 1998. The Notice of Right to Sue is dated August 2, 1999. He is a former employee, as of 3/31/2000.

The following Plaintiffs are former employees:

Mary Anne B. Frost	2/4/1998
Ervis Gregory	12/16/1996
Denny Majors	8/17/2001
Phyllis Nelson	1/11/2000

Plaintiff John Kuenning is a current employee.

Defendant alleges that Jack Haneline (not a party in this case) filed an undated and un-notarized charge with the EEOC at some time prior to June, 1996. His Notice of Right to Sue is dated June 24, 1996. Haneline did not file suit against Defendant.

I. Time Limits under the ADEA

A person seeking to pursue a claim under the ADEA must file a charge with the EEOC within 300 days

after the alleged unlawful practice occurred. Florida is a deferral state.

A plaintiff may commence an ADEA case in court: 1) as early as sixty days after filing a charge of discrimination with the EEOC or 2) as late as ninety days after receiving a Notice of Right to Sue. The 90-day time limit is akin to a statute of limitations, and the time limitations are to be strictly construed. The 90-day limit is, however, subject to equitable doctrines such as waiver, tolling and estoppel.

The purpose of the sixty-day time limit is to afford the EEOC or state agency the opportunity to informally conciliate disputes and thereby divert them from the Courts. The ADEA does not require that the plaintiff first received a right to sue notice from the EEOC before commencing suit.

A. Front End Time Limits

Defendant argues that the discrimination charges are not timely because they relate to acts which took place in 1994 and 1995. In looking at the face of each Plaintiff's discrimination charge, each charge states a date of "latest acts" of discrimination that is within the 300 day limit. Since the Complaint could be amended to reflect that fact, as well as amended to pursue a claim under the continuing violation theory, the Court will not grant the Motion to Dismiss on the basis of this issue.

B. Back End Time Limits

Defendant alleges that this case was not filed within ninety days of receipt of the "Notice of Right to Sue" and therefore this case has been brought beyond the statute of limitations. Defendant argues that the latest

date of receipt is on the Freeman Notice of Right to Sue, September 15, 1999. This case was filed on May 9, 2002, which is beyond the ninety-day period.

Plaintiffs argue that Plaintiff Bost submitted an intake Questionnaire and six-page affidavit to the EEOC on December 18, 2001, and that the documents contain sworn allegations of continuing age discrimination. Plaintiffs argue that these documents are sufficient to constitute a charge. *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1317-1332 (11th Cir, 2001).

In *Wilkerson*, the Eleventh Circuit Court of Appeals held that an intake questionnaire, which includes the basic information suggested by the applicable regulation, may constitute a charge for purposes of Title VII's statute of limitations when the circumstances of the case would convince a reasonable person that the charging party manifested her intent to activate the administrative process by filing the intake questionnaire with the EEOC. In *Wilkerson*, the Eleventh Circuit was persuaded by Wilkerson's conversations with the EFOC, the misleading indications of the intake questionnaire form, and the EEOC'S ultimate response, that Wilkerson manifested her intent to activate the administrative process by submitting her verified intake questionnaire to the EEOC. In *Wilkerson*, there was some delay in the charge-filing process that was not caused by the petitioner, and in spite of the delay the petitioner continued to pursue her claim. The Eleventh Circuit found that "the manifest intent approach ensures that once a charging party's intent is made clear, the EEOC's inaction will not vitiate her claim. Finally, under this approach, we [the Eleventh Circuit] will not treat intake questionnaires willy-nilly as charges." *Wilkerson* at 1320.

Plaintiffs also rely on *Edelman v. Lynchburg College,* 535 U.S. 106 (2002). In *Edelman*, the Supreme Court upheld the validity of the EEOC regulation permitting an otherwise timely filer to verify a charge after the time for filing has expired. On June 6, 1997, Lynchburg College denied tenure to petitioner Edelman. The petitioner faxed a letter to the EEOC field office on November 14, 1997, claiming employment discrimination. An EEOC employee specifically notified the petitioner of the filing limit of 300 days after the alleged discriminatory practice. After the petitioner was interviewed, the EEOC sent the petitioner a Charge of Discrimination to review and verify by oath or affirmation. The Charge of Discrimination was filed on April 15, 1998, 313 days after the June 6, 1997 denial of tenure. The EEOC sent the Charge to Lynchburg College for response, and later issued Edelman a Notice of Right to Sue. When Edelman sued, the District Court found that the November letter was not a "charge" so there was no timely filing to which the later Charge could relate back. The District Court found no ground for equitable tolling, and dismissed Edelman's Title VII complaint.

As the Supreme Court notes in *Edelman*, the time limitation and the oath requirement of the charge serve different functions:

> The time limitation is to encourage a potential charging party to raise a discrimination claim before it gets stale, for the sake of a reliable result and speedy end to any illegal practice that proves out. The verification requirement has the different object of protecting employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by

> oath subject to liability for perjury. This object, however, demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC.

Edelman at 1149.

The Court notes that although the Supreme Court found that the judgment of the Court of Appeals should be reversed as to the relation-back regulation, the case was remanded on another issue. The Court's judgment did not reach the conclusion drawn by the District Court that the original faxed letter was not a charge because neither the petitioner nor the EEOC treated the letter as a charge. The EEOC did not comply with the obligation to provide the employer with notice within ten days of receipt of the letter. The significance of the delayed notice was an issue to be resolved on remand. On remand, the Fourth Circuit Court of Appeals found that the faxed letter was a valid charge, although the EEOC did not assign it a number and did not forward a copy to the employer defendant, because those defects were not deficiencies in the charge, but were failures of the EEOC to carry out its duties. *Edelman v. Lynchburg College*, 300 F.3d 400 (4th Cir. 2000). The Court notes that there was a specific communication between Edelman's counsel and the EEOC which established November 14, 1997 as the filing date of the initial charge. In a letter, Edelman's counsel stated: "It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct." Edelman's counsel was never advised that his understanding was incorrect.

Wilkerson and *Edelman* establish that, under some circumstances, a verified charge questionnaire can be considered a timely charge. These cases do not establish that in every case, a verified charge questionnaire will be considered a charge. After consideration, the Court concludes that how the parties treat the charge questionnaire and complete the normal. sequence of the administrative process is an important factor in making the determination.

The EEOC issued a Notice of Right to Sue to Petitioner Bost on August 28, 2002 (Dkt. 13, p. 9). Plaintiffs argue that since this case was commenced after sixty days notice to the EEOC, it is timely. Plaintiffs argue that Plaintiffs Bost provided the EEOC with all necessary information in December 2001, but Defendant Federal Express was not notified of the charge until Bost signed a formal charge form on May 30, 2002. Plaintiffs argue that Bost's charge is valid, since any procedural defect arises from the EEOC's failure to carry out its duties.

The Court has considered the sequence of events as it relates to the charge of discrimination of Anthony Bost. The Court concludes that this is not a case in which the charge questionnaire should be considered the formal charge of discrimination. Plaintiffs have not brought forth any facts which justify reliance on *Wilkerson v. Grinnell*, 270 F.3d 1314 (11th Cir. 2001). With the assistance of counsel, Petitioner initiated the complaint process. Petitioner Bost signed the formal charge form on May 30, 2002, and a Notice of Right to Sue was issued on August 28, 2002. The normal administrative process was observed.

Plaintiffs have argued that the inaction by the EEOC from December 2001 through May 2002 should not

prevent Petitioner Bost from pursuing his claim, keeping in mind that the ADEA is a remedial scheme in which laymen, unassisted by trained lawyers, initiate the process. However, Bost's Intake Questionnaire shows that Petitioner Bost was assisted by counsel on October 18, 2001 in initiating his complaint. The pleadings in this case do not reveal what, if anything, Plaintiff Bost's counsel did in the time between the questionnaire and the formal charge to document any attempt by Bost to file a formal charge, and Plaintiff has not explained why he did not file a formal charge sooner. This is not a case like *Wilkerson*, in which a *pro se* individual tried to maneuver through the EEOC's administrative process.

This case was filed on May 9, 2002, before the filing of the formal charge, and before any notice to Defendant. The exhaustion of administrative remedies is what affords the Court subject matter over the proceedings. Therefore, the Court concludes that the Bost charge is not a valid charge.

II. Piggybacking

"Piggybacking" is appropriate in ADEA cases. See *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). To serve as the basis for an ADEA class action, the underlying EEOC charge must contain allegations of class-wide discrimination. The objective of the piggybacking rule is to allow non-filing plaintiffs to rely on the charges of filing plaintiffs when it would be a useless act for the non-filing plaintiffs to file their own charges.

In order to invoke the single-filing rule, Plaintiffs must meet three requirements:

1) the relied-upon EEOC charge is valid;

2) the claims of the filing and non-filing plaintiffs arise out of similar discriminatory treatment in the same time frame;
3) the charge actually filed gave the employer notice of the collective or classwide nature of the charge.

Defendant argues that none of the charges at issue in this case is a valid charge, the claimants are not similarly situated, and the charges actually filed did not give Defendant notice of the collective or class-wide nature of the charge.

A. Plaintiff Bost's Charge

Plaintiffs argue that Plaintiff Bost's charge entitles four Plaintiffs who worked for Defendant to join this case: Clausnitzer, Freeman, Kuenning, Majors.

The Court has determined that the Bost Charge is not a valid charge, and therefore, on that basis alone, the requirements of *Grayson* are not met for Plaintiffs Clausnitzer, Freeman, Kuenning and Majors. The charge is not valid because it was filed after this case was filed.

The Court has examined the allegations of Plaintiff Bost's charge:

> For many years, more senior couriers received the earlier start times, because Federal Express allowed couriers to use their seniority to bid on open routes. Upon the adoption of Best Practices Pays/High Velocity Culture Change, and the arrival of Terri Galloway as Senior Manager in the Tampa station, Federal Express systematically targeted me and other older

> couriers and awarded priority to younger, less senior couriers. Under these programs Federal Express granted and continues to grant preferences to younger couriers in routes, starting times, and other terms and conditions of employment, and to treat the older couriers less favorably. In addition, older workers are disciplined or threatened with discipline for minor or invented infractions, while younger workers engage in such conduct without issue.
>
> My income has been sharply reduced by these discriminatory practices, and management has done its best to cause me and other couriers to fail. Federal Express has generated a work environment that is hostile to me and other older couriers.

(Dkt. 17, Exhibit 11). The allegations of this charge may have been sufficient for the EEOC to conduct an investigation based .on class-wide allegations, but the charge was filed after this case was filed, and the EEOC issued a right-to-sue letter based on that fact. Defendant has argued that Defendant was never provided with the opportunity to conciliate with the EEOC any charges of class-wide age discrimination brought by Plaintiffs (Dkt. 14). The Court also examined the allegations of the charges of other Plaintiffs (Clausnitzer, Creamer, Freeman, Krolman, Maccia), and those charges indicate only individual claims.

Plaintiffs have argued that Plaintiffs, as laymen, could not be charged with knowing the legal significance of the charge allegations. However, in the Eleventh Circuit, the allegations of the charge must provide notice to the employer of the class-wide nature of the charge.

See Grayson v. K-Mart Corp., 79 F.3d 1086 (11th Cir. 1996), citing *Anson v. Univ. of Texas Health Science Ct.*, 962 F.2d 539, 541 (5th Cir. 1992). The Court agrees with the discussion of this issue in *Novitsky v. American Consulting Engineers, L.L.C.*, 196 F.3d 699 (7th cir. 1999):

> "Only the charge is sent to the employer, and therefore only the charge can affect the process of conciliation. What is more, the charge is not the work of some faceless bureaucrat, leaving victims of discrimination helpless to protect themselves. Complainants are free to draft and file charges on their own, or hire attorneys to do so, and a charge drafted by the EEOC's staff is not filed unless the complainant signs it – as Novitsky did. If she had been dissatisfied with the staff's understand of her answers, all she had to do was point this out and ask for an addition."
>
> [W]hether or not the complainant had a lawyer, whether or not she sought or listened to counsel, indeed, whether or not she read or understood the charge, it was *her* charge, and it did not put her former employer on notice ....

Novitsky at 702 703.

Because the Bost charge is not a valid charge, other Plaintiffs may not "piggyback" on that charge. The Court will therefore address the disposition of the claims of the other Plaintiffs.

B. The Freeman Plaintiffs

Five Plaintiffs filed Freeman I on October 26, 1999: Gerald D. Freeman, Vincent J. Maccia, Ronald Clausnitzer, Kathy L. Creamer and William G. Krolman. On September 25, 2000, Judge Moody dismissed the case without prejudice, and granted 20 days to file an amended complaint. Also, the motion for certification was denied, among other dispositions. Plaintiffs filed a Motion for Reconsideration, which was denied on October 16, 2000. Plaintiffs did not file an amended complaint. Plaintiffs filed a Notice of Interlocutory Appeal on October 24, 2000. On November 27, 2000, Judge Moody issued an Order to Show Cause why the case should not be dismissed for failure to prosecute. Plaintiffs filed their response (Dkt. 94) and requested that the case not be dismissed, due to their belief that the case was stayed by the appeal. The Court denied the Motion to Stay pending appeal. Later, on February 9, 2001, Plaintiffs requested additional time to file an amended complaint, and the Court granted the request. An amended complaint was filed on March 6, 2001. Federal Express requested a stay pending appeal (Dkt. 115), which the Court granted. The decision of the Eleventh Circuit Court of Appeals was issued as a mandate on February 12, 2002. The Eleventh Circuit Court of Appeals affirmed the decision to dismiss the case without prejudice. On March 28, 2002, Judge Moody directed the administrative closure of the case, since the order of dismissal became final on October 23, 2000. The present case was filed on May 9, 2002.

Plaintiffs who have not filed administrative charges may "piggyback" on the timely filing of an administrative charge filed by another claimant who purported to represent the interests of a class of similarly situated plaintiffs... Plaintiffs who file administrative charges are bound by the statute of limitations, which is

normally stated in the right-to-sue letter .... [O]nce they file separate administrative charges, they cannot rely any further on the other claimant's actions and must timely file suit after receiving their right to sue letters. *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554 (11th Cir. 1997).

Defendant argues that this case is beyond the ninety-day limit for the Freeman Plaintiffs. Defendant argues that the filing of a suit which is ultimately dismissed without prejudice does not authorize a subsequent suit brought outside of the otherwise binding statute of limitations. *Farris v. United States*, 877 F.Supp. 1549, 1552 (M.D. Fla. 1994).

Plaintiffs argue that the commencement of Freeman I suspended the applicable statute of limitations as to all Plaintiffs and to all experienced couriers over the age of 40 who would have been parties had the suit been permitted to continue as a class action. *Crown, Cork & Seal v. Parker*, 462 U.S. 345, 354 (1983).

Plaintiffs argue that the Freeman I Plaintiffs and three other Plaintiffs may join this case. Plaintiffs argue that all were FedEx employees when Plaintiff Freeman filed his charge, and all can assert claims in this action as a result of the notice to FedEx by the Freeman I plaintiffs. Plaintiffs argue that the Freeman I Complaint kept FedEx on notice of the allegations of a company-wide pattern and practice of age discrimination against older couriers, and therefore tolled the period of limitations for the plaintiffs and others who would have been parties if the suit had been permitted to continue as a class action. Plaintiffs argue that the parties actively pursued the case after the appeal was filed.

Federal courts extend equitable relief only sparingly. Equitable tolling has been permitted where the claimant.has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Irwin v. Department of Veterans Affairs*, 111 S.Ct. 453 (1990). In general, equitable tolling is warranted when the plaintiff has been lulled into inaction the past employer, state or federal agencies, or the courts, or if a plaintiff is actively misled, or has in some extraordinary way been prevented from asserting his or her rights.

This circuit has held that the fact that dismissal of an earlier suit was without prejudice does not authorize a subsequent suit brought outside the otherwise binding period of limitations. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), citing *Goff v. United States*, 659 F.2d 560 (5th Cir. 1981).

In *Farris v. United States*, 877 F.Supp. 1549 (M.D. Fla. 1994), the Court discusses the importance of statutes of limitation, noting that statutes of limitation protect defendants:

> Promoting justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Moreover the courts ought to be

> relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

Farris at 1552 (internal citations omitted). In *Farris*, the Court also discusses equitable tolling, noting that the above concerns may be outweighed upon finding an inequitable event that prevented plaintiff's timely action. The burden is on the plaintiff to show that equitable tolling is warranted.

"The interests of justice side with the defendant when the plaintiff does not file [suit] in a timely fashion despite knowing or being in a position reasonably to know that the limitations period is running, and, of course, the [the plaintiff] fails to act with due diligence." (Citation omitted).

In Freeman I, the Court dismissed the complaint, but granted additional. time to amend the complaint to cure the defects. During that time, Plaintiffs did not act to cure the defects, or lodge a request for additional time to do so. In their Motion for Reconsideration, Plaintiffs did not alert the Court to any statute of limitations issue. Plaintiffs elected to pursue an appeal, and thereby waived their right to amend the Complaint. The Eleventh Circuit Court of Appeal affirmed the dismissal on January 14, 2002, and the opinion was issued as a mandate on February 12, 2002. However, after the filing of the appeal, both Plaintiffs and the Court treated the appeal as if it was an interlocutory appeal, rather than an appeal of a final order. Plaintiffs sought an extension of time (Dkt. 104), and filed an amended complaint (Dkt. 112). After a hearing (Dkt. 130), on March 28, 2002, the Court granted Defendant's motion to administratively close the case due to lack of subject matter jurisdiction (Dkt. 129). The Court ruled that all of the proceedings in

the District Court after the order of September 25, 2000 became final on October 23, 2000 were a nullity.

At the outset, the Court notes that Plaintiff Krolman did not participate in the appeal of Freeman I, and therefore, under any possible scenario, equitable tolling does not apply to the Krolman claim, and the Motion to Dismiss as to the claim of Plaintiff Krolman is granted. Plaintiff has argued that there is a disputed factual issue as to the date of receipt of his notice of right to sue, but the Court concludes that since Plaintiff participated in the prior case and did not pursue an appeal, his claim has been adjudicated on the merits.

The Court notes that Plaintiffs continued to pursue their complaint after it was dismissed, and that Defendant was on notice of the class-wide allegations during that time. However, the Court must grant the Motion to Dismiss as to these claims. The rule in this Circuit is that an order dismissing a case without prejudice when the plaintiff elects not to amend is a Fed.R.Civ.P. 41(b) adjudication on the merits. *Robinson v. Federal National Mortgage Assn.*, 673 F.2d 1247 (11th Cir. 1982). Relief in equity generally is inappropriate when the moving party has an adequate remedy at law. *Justice v. United States*, 6 F.3d 1478 (11th Cir. 1993). Here, Plaintiffs chose to avail themselves of their remedy at law. The Court therefore grants the Motion to Dismiss as to the Freeman I Plaintiffs.

C. Other Named Plaintiffs

The Court has found that there is no valid charge on which the other named Plaintiffs can "piggyback" their claims; There was no motion for class certification filed in this case, and the motion for class certification was denied in Freeman I.

Plaintiffs have argued that the Complaint filed by the Freeman plaintiffs kept Defendant on notice of the allegations of a pattern and practice of age discrimination, and therefore tolled the statute of limitations. Plaintiffs rely on *Crown, Cork & Seal v. Parker*, 462 U.S. 345 (1983), arguing that the pendency of a class action lawsuit tolls the period of limitations for persons who are members of the class, even if they have not filed separate charges and had never become parties to the suit.

Defendant responds that, even if the Court finds that Plaintiffs had the benefit of tolling until October 23, 2000, when the dismissal became final, the ninety day period for others relying on the Freeman charges to file suit expired a year and a half prior to the commencement of this action on May 9, 2002. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1380 (11th Cir. 1998) (90 day period to sue re-commences when the district court dismisses the putative class action).

The remaining Plaintiffs in this case did not file individual charges of discrimination, and did not receive a Notice of Right to Sue. The cases which support tolling of the statute of limitations will not aid the Plaintiffs, since they did not receive a Notice of Right to Sue. It is the Notice of Right to Sue which starts the ninety-day period to file suit. The Court has found that there is no valid charge of discrimination containing class allegations on which these Plaintiffs can rely. Pursuant to *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996), the Court must grant the Motion to Dismiss as to the remaining named Plaintiffs.

D. Opt-In Plaintiff

One Plaintiff filed his consent to join this case (Dkt. 18). According to the notice, Plaintiff Natalina is a current employee of Defendant. The opt-in procedure is appropriate in ADEA class actions. After consideration, the Court concludes that this Plaintiffs cannot rely on the charges filed by any other named Plaintiff in this case. The Court urges Plaintiff to consult counsel in pursuit of his claims.

III. State Claims

The Florida Civil Rights Act requires an employee alleging age discrimination to file a charge of discrimination prior to filing suit. A charge must be filed within 365 days of the alleged unlawful employment practices.

If a plaintiff receives a finding of "no cause" as to the alleged discriminatory acts, the Florida Commission on Human Relations (FCHR) dismisses the charge, and the charging party has 35 days to request an administrative hearing. If the FCHR finds "reasonable cause," the charging party may either request an administrative hearing or commence a civil action. The charging party has one year from the date of the final order to file a civil action.

Defendant argues that the latest charge date was April 15, 1998, and the statute of limitations expired before this Complaint was filed on May 9, 2002. Defendant therefore requests the dismissal of the state claims.

A plaintiff must wait 180 days before filing a lawsuit on a FCRA charge. The filing date of this case is

before the Bost charge, and therefoce it cannot provide a basis for the FCRA claims.

After consideration, the Court concludes that the state claims are untimely under the applicable statue of limitations and grants the request for dismissal. Accordingly, it is

ORDERED that the Motion to Dismiss (Dkt. 7) with prejudice is granted, and the Clerk of Court shall close this case.

DONE and ORDERED in Chambers, in Tampa, Florida on this 18 day of February, 2003.

/s/ ELIZABETH A. KOVACHEVICH
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[DATE STAMP
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ANTHONY W. BOST, et a1.,
Plaintiff(s),

vs. CASE NO. 8:02-CV-837-T-17MSS

FEDERAL EXPRESS CORPORATION,
Defendant(s).

ORDER

This cause is before the Court on:

Dkt. 22 Motion for Leave to Alter or Amend Order
Dkt. 24 Response
Dkt. 25 Supplemental Motion for Leave to Alter or Amend
Dkt. 30 Response

The Court gave its full consideration to the issues raised in this case in its prior order dismissing the case (Dkt. 21). Plaintiffs have not brought forth anything which convinces the Court that its decision requires correction. Accordingly, it is

ORDERED that the Motion for Leave to Alter or Amend Order (Dkt. 22) and the Supplemental Motion for Leave to Alter or Amend Order) are denied.

DONE and ORDERED in Chambers, in Tampa, Florida on this 5th day of May, 2003.

/s/ ELIZABETH A. KOVACHEVICH
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[DATE STAMP
FILED
03 JUN -3 AM 8:28
TAMPA, FLORIDA]

ANTHONY W. BOST, et a1.,
Plaintiff(s),

vs. CASE NO. 8:02-CV-837-T-17MSS

FEDERAL EXPRESS CORPORATION,
Defendant(s).

ORDER

This cause is before the Court on:

Dkt. 34 Motion for Leave to Alter or Amend Order
Dkt. 35 Response

Plaintiffs request that the Court alter its prior order dismissing Plaintiffs' state law claims as untimely. Reconsideration of a previous order is an extraordinary measure, and the Court finds that reconsideration is not appropriate. Accordingly, it is

ORDERED that the Motion for Leave to Alter or Amend Order (Dkt. 34) is denied.

DONE and ORDERED in Chambers, in Tampa, Florida on this 3d day of June, 2003.

/s/ ELIZABETH A. KOVACHEVICH
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

[DATE STAMP
02 MAY -9 PM 2:49
CLERK, U.S. DISTRIC COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA]

Anthony W. Bost, Ronald Clausnitzer, Kathy Creamer, Gerald D. Freeman, Mary Anne B. Frost, Ervis Gregory, William Krollman, John Kuenning, Vincent J. Maccia, Denny J. Majors and Phyllis Nelson, individually and on behalf of others similarly situated,
Plaintiffs,

v.

Federal Express Corporation,
Defendant.

JURY DEMAND

COMPLAINT SEEKING INJUNCTIVE RELIEF, CLASS ACTION AND DEMAND FOR JURY TRIAL

1. This suit is brought to obtain and secure rights granted by the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621 et seq. ("ADEA") and the Florida Civil Rights Act, Fla. Stat. §§ 760.01 *et seq.* ("FCRA").

JURISDICTION

2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 1367 and 29 U.S.C. §§ 216(b) and 628(b). This Court has venue under 28 U.S.C. 1391(c).

PARTIES

3. The defendant Federal Express Corporation ("Federal Express") is a corporation engaged in the transportation of packages by air and ground throughout Florida and other states in the United States and elsewhere. The headquarters of Federal Express is in Memphis, Tennessee.

4. Federal Express employs more than 100,000 persons in the United States, at more than 3,000 stations, including more than 45,000 persons who drive trucks and pick up and deliver packages to and from businesses and residences in the United States. Such employees are called express couriers (hereafter "couriers").

5. Defendant is an employer within the definition and coverage of the ADEA, 29 U.S.C. § 630(b). Defendant is an employer within the definition and coverage of the FCRA.

6. Plaintiffs are employees or former employees of Federal Express who are or were employed in the State of Florida by Federal Express as couriers. Each of them is more than 40 years of age and each of them has had more than ten years of experience with Federal Express as couriers. Plaintiffs bring this suit on behalf of themselves and on behalf of other similarly situated Federal Express couriers in the State of Florida.

FACTUAL ALLEGATIONS

7. At all material times, Federal Express has made written and other pledges of "Guaranteed Fair Treatment" to couriers and to its other employees, and Federal Express had promised that it would provide couriers with fair and non-discriminatory treatment, without favoritism.

8. At all material times Federal Express assured couriers in writing that each of them could be assured of a job at Federal Express "if I do a good job."

9. Federal Express provides as part of its compensation to couriers and other employees a health plan that assures assistance in the payment of medical expenses, drug prescriptions and dental expenses. It promises Medical Absence Pay and Short-Term and Long Term disability benefits if the employee is sick or injured and unable to work. Federal Express provides a pension plan, and has a profit sharing plan, a retirement saving plan, and an optional saving plan. For a courier who earned $33,893 in gross pay including overtime in 1994, Federal Express estimated in a booklet distributed to couriers that the fringe benefits package for 1994 cost it $15,161.

10. By 1994, each of the plaintiffs had become an efficient full time courier who met or exceeded Federal Express' guidelines for performance by couriers. Each of them had received excellent or good performance evaluations as couriers from the time they were hired as couriers until at least that year.

11. From the time they were hired as couriers until sometime in 1994, Federal Express treated the named plaintiffs and other similarly situated couriers who were

more than 40 years old no differently than younger couriers.

12. In 1994, Federal Express began to adopt practices and policies that were intended to and did operate to reduce the number and percentage of couriers over the age of forty (hereafter frequently "older couriers"), both "part time" and full time, by treating them less favorably than younger couriers. These practices and policies were intended to require and encourage the termination of the employment relationship between Federal Express and older couriers before the older couriers wished to retire. Federal Express published some of the policies throughout its establishments. Federal Express kept some of the new policies and practices clandestine, particularly those involving the targeting of older couriers for harassment, discipline and discouragement, so that some would be fired and others would leave because of the harassment and pressure.

13. In November 1994, Federal Express adopted as part of the program described in paragraph 12 above, a compensation system called "Best Practices Pays" ("BPP"). Federal Express described BPP as an incentive contest between stations meeting or exceeding station budget goals. At approximately the same time, Federal Express adopted "Minimum Acceptable Performance Standards" ("MAPS").

14. BPP and MAPS became in fact a new compensation system that Federal Express used to favor new, young couriers, and to force or encourage plaintiffs and other older, experienced couriers to leave their employment with Federal Express.

15. Under the policies and procedures adopted in 1994 and 1995, Federal Express gave managers and other

supervisors lists of older couriers who were to be targeted for increased supervision, discipline, harassment and for termination if some cause could be established. Under these policies and procedures, Federal Express gave older couriers who were injured or who otherwise required medical absences intense scrutiny and harassment and found reasons to discharge many of them from employment. Under these policies and procedures, Federal Express discharged a disproportionately high percentage of older couriers (as compared to younger couriers), and discharged an even higher percentage of older couriers who had been injured on the job or otherwise required medical absences.

16. Under the policies and practices described above, Federal Express gave young, inexperienced couriers, including so called "part time" couriers who often worked on a full time or more than full time basis, preference in starting times, in overtime assignments, and in route assignments over older, more experienced couriers, and particularly those on the target lists.

17. Prior to the new compensation system described above, Federal Express did not count (as unauthorized leave) absences from work due to temporary disability caused by job related or other injury or illness. With the adoption of the BPP and MAPS system, however, Federal Express treated all absences from work as creating an attendance problem, leading to discipline and possible discharge, including absences due to on the job injuries, other injuries and other medical problems, beyond the control of the couriers. As part of the new system, Federal Express introduced a new "30 day/90 day Courier Route and Station" assignment policy. Under that policy, any absence of more than 30 days, including absences due to on the job injuries and other medical problems, became grounds for losing a regular route assignment. Similarly,

under that policy, any absence of more than 90 days became grounds for removal of the courier's full or part-time station slot – that is, loss of employment with Federal Express. Other devices, including so called knowledge tests, were adopted and used to discriminate against older couriers in favor of younger couriers. Under the policies described above, Federal Express treated older couriers less favorably than younger couriers, and fired older couriers more frequently and in larger proportions than younger couriers, and encouraged older couriers to leave rather than be terminated.

18. Under the BPP check-ride format stated by Federal Express, each courier was to agree with his supervisor upon a reasonable and safe number of stops per hour on the courier's route that could reasonably be achieved by the courier. At first, the number of stops was a goal which would result in enhanced pay for one pay period for one station in a geographical area, if achieved. Over time, however, Federal Express treated the goals as the minimum acceptable number of stops that older couriers were required to make in order to retain the position as a courier. Under the BPP check-ride format as implemented, a failure of a courier to achieve that number was grounds for a "performance reminder" and then disciplinary action up to and including termination of the employment of older couriers. While older couriers were written up for infrequent and occasional failures to meet the goals, or for error, in delivering packages, younger couriers were rarely disciplined for such matters.

19. Upon information and belief, Federal Express adopted the policies and procedures described above in paragraphs 12-18 to encourage or require a disproportionate share of older couriers to leave its employment before they became eligible for their retirement. Federal Express believed that elimination of

older couriers from its work force would reduce its hourly labor costs and the costs of its health and medical benefits, retirement program, and other fringe benefits. Federal Express intended the new procedures to reduce the regular and overtime pay for older, more experienced couriers, as compared to younger part time and full time couriers, and reduce costs of the other benefits for older couriers, and to cause the disproportionate termination of employment of older couriers.

20. In 1994 and thereafter, Federal Express held meetings of managers and other supervisors throughout the United States in order to implement the new discriminatory practices and procedures. Federal Express utilized a booklet entitled "High-Velocity Culture Change: a Handbook for Managers" to train managers to implement the new program. At those meetings, the managers were advised that older couriers were more likely to sustain injuries and be absent for long periods of time, and that their presence in the work force detracted from the ability of Federal Express to compete in the marketplace.

21. At these meetings, managers were told that if any manager did not think that he or she could do what was being asked of them under the new policies, he or she should leave Federal Express or step down from a management position to a courier position. At the meetings, Federal Express also told those managers that if they could not do what was asked of them, the company would find someone who could. Under the BPP program and other policies and procedures described above, Federal Express fired or displaced older managers disproportionately and replaced them with younger managers who supported the new procedures and practices.

22. Federal Express used the BPP and Station Review Process to allocate pay away from older more experienced couriers to newer, younger couriers, and to provide a systematic basis for terminating and intimidating the older couriers and favoring newer, younger couriers, who in fact were no more efficient or productive than the older couriers.

23. Federal Express has followed from some time in 1994 and each year thereafter a pattern or practice of employment procedures that discriminate because of age against plaintiffs and other similarly situated experienced couriers over 40 years of age, and in favor of less experienced younger couriers. The discriminatory employment practices of Federal Express include: a) redistributing overtime and regular hours from older couriers to younger couriers; b) increasing the productivity goals for older couriers, without similar increases for younger couriers; c) requiring check rides for older couriers and criticizing their performance, while letting younger couriers go without check rides, or with fewer check rides; d) writing up older couriers for alleged violations of rules, while ignoring similar or more severe violations of such rules by younger couriers; e) by treating three unrelated disciplinary letters as reason for terminating couriers, rather than only three disciplinary letters concerning the same problem, and increasing the length of time that each letter stayed in the courier's personnel file from six months to one and a half years; f) holding required meetings for older couriers, but not for younger couriers, and by advising those attending to find another job because they would not be retiring from Federal Express; g) advising some older couriers directly that it was their age that was causing their problems at Federal Express; h) changing the policy of Federal Express concerning on the job injuries, so that absenteeism from on the job injuries could result in

termination for cause; i) terminating older couriers for "cause" for minor infractions or for no infractions of the rules while favoring younger employees in such matters, and j) disciplining or terminating older couriers for failure to meet productivity goals, and then giving the route to a younger courier with reduced stops per hour or dividing the route into two new routes each with fewer stops per hour than the route for the older courier.

24. Employment practices that discriminate against older couriers and favor younger couriers, as described above, are the prevailing pattern or practice of Federal Express in the United States. While plaintiffs believe that this pattern or practice is not limited to one region or district or state, this suit is brought to enforce only the rights of those couriers who are or were employed by Federal Express at a place in Florida.

25. On information and belief, Federal Express has continued to follow that pattern or practice to the present.

26. The employment practices described above have had a discriminatory impact against couriers over the age of 40 and in particular against plaintiffs and the class of older couriers that they represent. Those practices are not consistent with business necessity.

27. Plaintiffs Clausnitzer, Creamer, Freeman, and Maccia are or were couriers over 40 who timely filed charges of age discrimination by Federal Express against older couriers on grounds of age, and they brought the subject lawsuit within 90 days of the dates of the issuance of the right to sue letter from the EEOC in *Freeman et al v. Federal Express Corporation*, Civ. 99-2466-Civ-T-30B. They met all of the prerequisites to filing suit required by the ADEA and the FCRA. That suit was dismissed by this

Court without prejudice on March 28, 2002. That suit placed defendant on continuing notice since the filing of Mr. Freeman's charge of the claims of the plaintiffs of age discrimination.

28. Plaintiff Anthony W. Bost brings this suit more than 60 days after he notified the United States Equal Employment Opportunity Commission of his charges that Federal Express has been engaged in discriminatory employment practices against older couriers. Each of the other plaintiffs is similarly situated to the plaintiffs named above.

29. Unless restrained by order of this Court, the defendant will continue to pursue policies and practices that are the same, or similar or related to the policies and practices alleged in this Complaint. Such policies and practices have caused plaintiffs and other couriers similarly situated irreparable harm that cannot be remedied at law.

COUNT I
CLAIMS UNDER THE ADEA

30. Plaintiff Freeman notified Federal Express in 1995 that it had targeted him and other older couriers for discriminatory harassment and or termination. On June 6, 1996, plaintiff Freeman filed a charge that Federal Express discriminated against him and similarly situated older couriers in violation of the ADEA with the Clearwater Human Relations Department (PCO #9607-02543) and thereafter a charge with the United States Equal Employment Opportunity Commission, EEOC charge #15B960120 (C). The EEOC issued a right to sue letter to Freeman on or about September 15, 1999.

31. The practices described above in paras. 12-23 purposefully and wilfully discriminated against older couriers. Defendant Federal Express engaged in the discriminatory practices that harmed plaintiffs and other similarly situated employees with disregard for their rights under the ADEA and other provisions of law.

32. The employment practices described above in paras. 12-23 that were followed by Federal Express since the fall of 1994 had a discriminatory impact against couriers who were aged 40 and above. Those practices were not required by business necessity, and were not consistent with business necessity.

33. Federal Express was placed on notice of the charge that it was discriminating on the basis of age against couriers over the age of 40 pursuant to the practices it adopted in 1994 as early as May, 1995, by EEOC Charge #151951501, filed in that month by Jack Haneline II.

34. Federal Express couriers who are not yet plaintiffs in this case, but are more than 40 years of age and who have at least ten years of service with Federal Express and who have been employed subsequent to the spring of 1994 are similarly situated to plaintiffs Freeman, Maccia, Clausnitzer, Creamer and Krolman.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for orders requiring the defendant Federal Express to notify current couriers over 40 years old who are employed in Florida and those older couriers who were employed by Federal Express in Florida during the time period described in this suit of the pendency of this suit and the right of persons similarly situated to the plaintiffs to participate in this suit if they consent to do so;

WHEREFORE the plaintiffs further pray for an order declaring unlawful the age discriminatory practices of Federal Express, and orders preliminarily and permanently enjoining defendant Federal Express and its officers, agents, employees, successors and all persons in active concert or participation with it from engaging in employment practices that discriminate on the basis of age, and specifically from:

1) treating older couriers less favorably than younger couriers in the allocation of start times, routes and overtime opportunities;

2) terminating or disciplining couriers who are absent from work because of injuries or other medical problems while they are recovering from same, unless and until it becomes clear that they are permanently disabled from performing the duties of a courier; and

3) treating older couriers less favorably than younger couriers in discipline and other terms and conditions of employment; and

4) failing or refusing to reinstate to their prior position as couriers the plaintiffs and opt in plaintiffs who were terminated or who left the employment of Federal Express because of the discriminatory practices described above, with seniority and fringe benefits in a manner that makes them whole for the loss of employment that they have suffered; and

WHEREFORE Plaintiffs further pray for:

a) an award of damages to them for the loss of income they have suffered, including the loss of fringe benefits, and for such other relief as is appropriate to make them whole, and for those couriers who have lost

their positions with Federal Express, for loss of future income and benefits until such time as they have been reinstated or offered reinstatement;

b) liquidated damages to the extent permitted by law;

c) pre- and post judgment interest;

d) costs of litigation including attorneys' fees and expert witness fees; and

e) such other relief as may be just and proper.

COUNT II
CLASS ACTION CLAIMS
UNDER the FLORIDA CIVIL RIGHTS ACT

35. The allegations of paragraphs 1-34 above are hereby incorporated by reference.

CLASS ACTION ALLEGATION

36. Plaintiffs represent all similarly situated couriers for purposes of age discrimination claims in Florida, and under the Florida Civil Rights Act, Fla. Stat. § 760.01 *et seq.* ("FCRA").

37. Plaintiffs have exhausted administrative remedies under the Florida Civil Rights Act.

38. Defendant employs 45,000 couriers nationwide. Plaintiffs seek to represent all such couriers over 40 years of age who are or were employed by Federal Express in Florida.

39. The claims of the named plaintiffs and of other older couriers share common questions of fact, and common questions of law under state law, including whether Federal Express intentionally engaged in a pattern or practice of age discrimination against older couriers by adopting employment practices that were intended to, and did in fact result in driving older couriers out of employment as couriers of defendant Federal Express or otherwise discriminated against them in their pay and other terms and conditions of employment, and whether the practices of Federal Express that discriminated against couriers over 40 years of age were consistent with business necessity.

40. Plaintiffs' claims are typical of the age discrimination claims of the class they will seek to represent. Plaintiffs include current couriers who have been harassed and discriminated against in the terms and conditions of their employment, former couriers wrongfully terminated by Federal Express, and former couriers compelled to resign as couriers by Federal Express. Plaintiffs all claim that Federal Express intentionally engaged in a pattern or practice of age discrimination against older couriers by adopting company-wide plans that were intended to and did drive older couriers out of the company disproportionately. The factual issues concerning liability under the state law claims are identical or similar to the issues concerning liability under the ADEA, as are the issues concerning loss of earnings, and the willfulness of the conduct of Federal Express.

41. Plaintiffs are adequate representatives of the class they will seek to represent because they have retained experienced counsel with a multi-state practice in age discrimination matters, collective actions and other employment discrimination matters. Because plaintiffs

are not and were not supervisors there are no conflicts between their interests and the class they will seek to represent.

ALLEGATIONS PERTAINING TO DAMAGES

42. As a result of Defendant's actions, Plaintiffs have suffered, suffer, and will suffer humiliation, embarrassment, mental anguish, inconvenience, damage to reputation, and injury to professional standing.

43. Defendant acted with reckless disregard for Plaintiffs' civil rights.

PRAYER FOR RELIEF

WHEREFORE the plaintiffs further pray for an order preliminarily and permanently enjoining defendant Federal Express and its officers, agents, employees, successors and all persons in active concert or participation with it from engaging in employment practices that discriminate on the basis of age, and specifically from:

1) treating older couriers less favorably than younger couriers in the allocation of start times, routes and overtime opportunities;

2) terminating or disciplining couriers who are absent from work because of injuries or other medical problems while they are recovering from same, unless and until it becomes clear that they are permanently disabled from performing the duties of a courier; and

3) treating older couriers less favorably than younger couriers in discipline and other terms and conditions of employment; and

4) failing or refusing to reinstate to their prior position as couriers the plaintiffs and opt in plaintiffs who were terminated or who left the employment of Federal Express because of the discriminatory practices described above, with seniority and fringe benefits in a manner that makes them whole for the loss of employment that they have suffered; and

WHEREFORE Plaintiffs further pray for:

a) an award of loss of income to them and all other persons similarly situated for the loss of income they have suffered, including the loss of fringe benefits, interest to compensate them for the time value of the money that they lost, and loss of future earnings for those couriers who have lost their positions with Federal Express until such time as they have been reinstated or offered reinstatement;

b) pre-judgment interest;

c) reinstatement with seniority and other fringe benefits as necessary to make them whole for those plaintiffs and members of the affected class who were terminated or who were left their employment because of the discriminatory policies of Federal Express;

d) compensatory damages for humiliation, pain and suffering, and other non-economic injuries;

e) punitive damages to the extent permitted by law;

f) costs of litigation including attorneys' fees and expert witness fees;

g) such other relief as may be just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Anthony W. Bost, Ronald Clausnitzer, Kathy L. Creamer, Gerald D. Freeman, Mary Ann B. Frost, Ervis Gregory, William Krollman, John Kuenning, Vincent J. Maccia, Denny J. Majors and Phyllis Nelson, individually and on behalf of others similarly situated,
Plaintiff,

v. Case No.: 8:02-CV-837-T-17 MSS

Federal Express Corporation,
Defendant.

DECLARATION OF CARL K. MORRISON

I, Carl K. Morrison, under penalty of perjury, declare as follows:

1. I am employed as a Senior Attorney by Federal Express Corporation, which conducts business as FedEx Express ("FedEx"), at its offices in Memphis, Tennessee. I am a member in good standing of the bar of the State of Tennessee, and I am admitted to appear in this action *pro hac vice* as one of the attorneys for FedEx. I present this declaration as an officer of the Court. I am a custodian of records for FedEx, and I am authorized to provide this Declaration on its behalf. The facts stated herein are true and correct.

2. I submit this Declaration in support of FedEx's Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds

that Plaintiffs have not exhausted the administrative remedies necessary to commence a lawsuit under the Age Discrimination in Employment Act and may not piggyback onto untimely actions. I reviewed the employment records maintained by FedEx for the eleven named plaintiffs to determine the geographic location in which each works or worked, the position held, the date of termination (if applicable), the date a charge of discrimination was filed with the Equal Employment Opportunity Commission ("EEOC") or any other agency responsible for enforcement of state or local employment discrimination laws (if applicable), the alleged basis of discrimination for any charges filed, and the date of issuance of any Notice of Right to Sue by the EEOC with respect to the charges. For the Court's convenience, I have summarized this information in the chart attached to this Declaration as Exhibit 1.

3. Attached hereto as Exhibit 2 are letters or other documents maintained in the ordinary course of FedEx business confirming the termination of employment for those plaintiffs who are no longer employed by FedEx.

4. Attached as Exhibit 3 are true and correct copies of the charges of discrimination filed against FedEx by Ronald Clausnitzer (2), Kathy Creamer, Gerald Freeman, William Krolman and Vincent Maccia (2).

5. Attached as Exhibit 4 are true and correct copies of the notices of right to sue received by FedEx from the EEOC with respect to the charges filed by Plaintiffs.

6. FedEx has no record of any charges of age discrimination being filed prior to commencement of this lawsuit with either the EEOC or any other agency

responsible for enforcement of state or local employment discrimination laws by any other individual named as a plaintiff in this lawsuit.

7. Attached as Exhibit 5 are true and correct copies of the charge of discrimination filed by Jack Haneline and the subsequent right to sue notice issued by the EEOC on June 24, 1996 with respect to his charge. This is the only charge of discrimination filed by Mr. Haneline against FedEx. Mr. Haneline has never filed an employment discrimination lawsuit against FedEx.

8. On October 26, 1999, a lawsuit for age discrimination entitled *Gerald Freeman, et. al v. Federal Express Corp., et. al* was filed in the United States District Court for the Middle District of Florida. Attached as Exhibit 6 is a true and correct copy of the cover page of the complaint in *Freeman*.

9. The *Freeman* litigation was dismissed by the District Court on September 25, 2000 without prejudice to re-filing it by October 23, 2000. Attached as Exhibit 7 is a true and correct copy of that order.

10. The *Freeman* plaintiffs appealed the dismissal order to the Eleventh Circuit, which affirmed the District Court's order. The two orders issued by the Eleventh Circuit with respect to the *Freeman* appeal are attached as Exhibit 8.

11. On March 28, 2002, the District Court ordered that the *Freeman* litigation be administratively closed by the clerk, on the grounds that the District Court's order of September 25, 2000 dismissing the original complaint with leave to re-file it by October 23, 2000 became final on October 23, 2000 when the *Freeman*

plaintiffs did not re-file by that date. A copy of that order is attached as Exhibit 9.

12. I declare under penalty of perjury, under the laws of the States of Tennessee and Florida, that the foregoing is true and correct. If called upon to testify, I could and would competently testify to the matters set forth herein.

Executed this 26th day of July, 2002.

/s/ Carl K. Morrison
Carl K. Morrison

Bost, et al v. Federal Express Corporation
U.S.D.C., Middle District of Florida (Tampa)
No. 8:02-cv837

LAST NAME	FIRST NAME	TERM DATE
Bost	Anthony	Active
Clausnitzer	Ronald	Active
Creamer	Kathy	7/9/1997
Freeman	Gerald	Active
Frost	Mary-Anne	2/4/1998
Gregory	Ervis	12/16/1996
Krolman	William	4/17/1997
Kuenning	John	Active
Maccia	Vincent	3/31/2000
Majors	Denny	8/17/2001
Nelson	Phyllis	1/11/2000

LAST NAME	REASON FOR TERMINATION	DATE(S) OF CHARGE(S)	DATE(S) OF NRTS
Bost	N/A	None	N/A
Clausnitzer	N/A	9/22/1997	8/2/1999
		3/26/1998	8/2/1999
Creamer	Violation of Medical Absence Leave policy	10/6/1997	8/2/1999
Freeman	N/A	7/8/1996	9/15/1999
Frost	Voluntary Resignation	None	N/A
Gregory	Violation of Medical Absence Leave policy	None	N/A
Krolman	Violation of Performance Improvement policy	12/29/1997	6/22/1999
Kuenning	N/A	None	N/A
Maccia	Retired	9/19/1997	8/2/1999
		4/15/1998	8/2/1999
Majors	Voluntary Resignation	None	N/A
Nelson	Voluntary Resignation	None	N/A

INTAKE QUESTIONNAIRE

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

EEOC USE ONLY
Name (Intake Officer)

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.

DOB: 11/23/55 (Please Print) SSN: 266-23-2910
NAME: Anthony Wayne Bost DATE: 12/18/01
ADDRESS: 6723 Grand Bahama Dr.
Phone No. (include area code): (813) 855-9340
CITY: Tampa STATE FLA ZIP CODE 33615

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you.

NAME: Jetoe D. Bost RELATIONSHIP: Mother
TELEPHONE: (813) 837-1469
ADDRESS: 4608 Vasconia Dr. CITY Tampa
STATE FL ZIP CODE 33629

Why do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)
Age Discrimination

What action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your work situation as a result of that action?

(e.g., Discharge, Discipline, or Harassment) (If more space is required, use reverse.)
Federal Express via Best Practice Pays targeted myself and other by more closely scrutinizing our productivity and start times and have received performance reminders and threats of additional courier disciplinary action where younger couriers are not even aware of such standards. Their continuing actions have cost me thousands of dollars and others emotional distress via their hostile work environment.

I believe I was discriminated against by: (Check those that apply)

☒ EMPLOYER ☐ UNION (Give Local No.)

☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

NAME: Federal Express
ADDRESS: 1881 Main St.
PHONE: (727) 736-6727

Approximate number employed by this employer: 100+

What was the most recent date the harm you alleged took place?
On/or about 9/15 and continuing

Are you now employed by the employer that you believe discriminated against you?
Yes

YES: FROM: 10/29/84
CURRENT POSITION: Courier

Normally, your identity will be disclosed to the organization which allegedly discriminated against you. Do you ☒ Consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source: ☐ NO ☒ YES (If answer is yes, complete below.)

NAME OF SOURCE OF ASSISTANCE:
David Rose/Attorney DATE: 10/18/01

RESULTS, IF ANY:

Have you filed an EEOC charge in the past?
☒ NO ☐ YES (If answer is yes, complete below.)

APPROX. DATE FILED:
ORGANIZATION CHARGED:
CHARGE NUMBER (If known):

SIGNATURE /s/Anthony Bost DATE 12/18/01

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974; Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below.)

1. *FORM NUMBER/TITLE/DATE. EEOC FORM 283, Intake Questionnaire, August 1987.*
2. *AUTHORITY. 42 U.S.C. § 2000e-5b, 29 U.S.C. § 211, 29 U.S.C. § 626.*
3. *PRINCIPAL PURPOSE. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction.*
4. *ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation.*
5. *WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. The providing of this infomation is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.*

CHARGE OF DISCRIMINATION

AGENCY
Enter Charge NUMBER

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

☐ FEPA
☒ EEOC

Florida Civil Rights Department and EEOC

NAME (Indicate Mr., Ms., Mrs.) Anthony W. Bost
HOME TELEPHONE (include Area Code) (727) 736-6727
STREET ADDRESS 6723 Grand Bahama Drive
CITY, STATE AND ZIP CODE Tampa, FL 33615
DATE OF BIRTH 11/23/55

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME Federal Express Corporation
NUMBER OF EMPLOYEES, MEMBERS more than 45,000
TELEPHONE (including Area Code) 800 463-3339
STREET ADDRESS 2600 Nonconnah, Suite 100
CITY, STATE AND ZIP CODE Memphis, TN 38132
COUNTY Shelby
CAUSE OF DISCRIMINATION BASED ON (Check appropriate box (es))

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION

☐ NATIONAL ORIGIN ☐ RETALIATION ☒ AGE
☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST LATEST
☒ CONTINUING ACTION
From Apr. 1995, and continuing to date, June/02

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s

For many years, more senior couriers received the earlier start times, because Federal Express allowed couriers to use their seniority to bid on open routes. Upon adoption of Best Practices Pays/High Velocity Culture Change, and the arrival of Terri Galloway as Senior Manager in the Tampa station, Federal Express systematically targeted me and other older couriers and awarded priority to younger, less senior couriers. Under these programs Federal Express granted and continues to grant preferences to younger couriers in routes, starting times, and other terms and conditions of employment, and to treat the older couriers less favorably. In addition, older workers are disciplined or threatened with discipline for minor or invented infractions, while younger workers engage in such conduct without issue.

My income has been sharply reduced by these discriminatory practices, and management has done its best to cause me and other couriers to fail. Federal Express has generated a work environment that is hostile to me and other couriers.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and

cooperate fully with them in the processing of my charge in accordance with their procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

I declare under penalty of perjury that the foregoing is true.

THIS 5 day of June, 2002

Anthony W. Bost
Charging Party (Signature) /s/ Anthony W. Bost

NOTARY - (When necessary for State and Local Requirements)
SUBSCRIBED AND SWORN TO BEFORE ME

DATE (Day, month, and year)

[illegible] Name (Intake Officer)
Reverse before completing this form.

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.

July 11, 1950 (Please print) SSN: 353-404255

NAME: Gerald D. Freeman Date: 06-05-1996
ADDRESS: 2700 Bayshore Blvd. #5105
Phone No. (include area code): (813) 733-2053
CITY: Dunedin STATE FL ZIP CODE 34698

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you

NAME: Elizabeth Wood RELATIONSHIP: Friend
TELEPHONE: (813) 736-0065 ADDRESS: 950 Broadway
CITY: Dunedin STATE FL ZIP CODE 34698

Why do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)
Age Discrimination based upon the Company's belief they can become more cost effective with a younger work force.

What action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your work situation as a result of that action? (e.g., Discharge, Discipline, or Harassment) (if more space is required, use reverse.)
Federal Express by instituting a "New" check-riding procedure and other "New" methods and Policies under the guise of their *Best Practice Pays* Program has, in

effect, abandoned many of the principals under which we were first employed. One such principal/*guarantee* has been reinforced annually via Survey-Feedback Action (S.F.A.) question #15: "CAN BE SURE OF A JOB IF I DO GOOD WORK"

Implicit in this statement is a promise that if I do a good job... I will always have a job. Now, after back-to-back record "after-tax" profit years, Federal Express wants to take it all back and say that those performance reviews you received (in those years and earlier) were gifts by laxidaisical management teams which were misguided into "giving" superior on-road performance ratings (i.e. 7.0, the highest) when they should have been giving out the minimum level of accepted performance, 4.0 or lower (i.e. the NEW standard raised the productivity *goals* in both cycles – thus an person could be performing under the minimum level, 3.9 or lower). And so, one day we were getting bonus pay for "X" amount of stops per hour and the following day, that same amount of work was insufficient for job retention!

Accordingly, I believe the "NEW" check-ride procedure was designed to promote discrimination by management against older employees. There is a greater frequency of check-rides to older employees, without reasonable cause (i.e. drop in performance; sufficient change in customer base; sufficient change in route boundaries; traffic; just in time for your performance review, etc.) when younger employees are taking to the road without as much training as in the past and thus their techniques or lack thereof would suggest that they should be the ones having a greater frequency of check-rides. Management has a sufiicient data base to determine how many stops you have run and are capable of running over a long period of time. They know your maximum capabilities, then they ceremoniously go through the motions of a "more thorough and object

formula for arriving at your *NEW GOALS*, which are *HIGHER* than your previous 13 week average. Thus, in order to save your job, you must somehow beat your average every week or face the axe. What is the immediate harm from such action, as previously stated, that productivity level that once was good enough to warrant bonus or PRO-PAY (which management has used to compare with U.P.S. annual raise, citing superiority when pro-pay included just as if it was a raise, some $1,500.00 plus annually) is not good enough to keep yoor job! And of course, all the while you are not making *their* goals (or making them, it doesn't seem to matter) management is harassing you with performance reminders and more check-rides. My last check-ride (April 3, 1996) had all the earmarks of harassment (provocation to make an outburst which would have lead to a suspension). The threat of an EEOC complaint has slowed the check-rides, however, my manager has suggested one is imminent on sevenl occasions, inferring it was my idea. Recently, management has designed a new form of harassment, one with a similar pattern of entrapment – a planned outburst. It was the old *good cop/bad cop* routine played out in the form of management first wanting to change my sort assignment only, then moving back my start time in order to cut my hours by 2.5 hours per week (See Affadavit, Exhibit "A" for GFT internal action taken). Instead of getting heated up by the frustration of it all, I chose to do more than threaten an EEOC complaint. But management has other "performance reminders" flooding your employee file where the training/re-training for such "NEW" Best Practice Pays Methods *is* another performance reminder. And if they can't get you fired for a "planned outburst", then they will still have your declining on-road performance (via "NEW" check-ride procedure) and *other* performance reminders to cumulatively say, *you are a poorly performing courier that should be terminated.*

I believe I was discriminated against by: (Check those that apply)

☒ EMPLOYER ☐ UNION (Give Local No.)

☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

NAME: FEDERAL EXPRESS
ADDRESS: 1881 MAIN ST.
DUNEDIN, FL
PHONE: (813) 736-6727

Approximate number employed by this employer: NINETY

What was the most recent date the harm you alleged took place? APRIL 22, 1996

Are you now employed by the employer that you believe discriminated against you?

YES: FROM: 7/27/82
CURRENT POSITION: Courier $14.49/Hr.

Normally, your identity will be disclosed to the organization which allegedly discriminated against you. Do you ☒ Consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source: ☐ NO ☒ YES (If answer is yes, complete below.)

NAME OF SOURCE OF ASSISTANCE:
INTERNAL GFTP

DATE: APRIL 26, 1996

RESULTS, IF ANY: WENT THROUGH STEP 1 PROCEDURE AND LOST DUE TO MANAGEMENT'S DECISION TO OVERLOOK ANY ASPECT OF DISCRIMINATORY MOTIVES; DECLINED STEP 2 FOR OBVIOUS REASONS. SEE, EXHIBIT "A", IN AFFIDAVIT, ATTCHED.

Have you filed an EEOC charge in the past?

☒ NO ☐ YES (If answer is yes, complete below.)

APPROX. DATE FILED:
ORGANIZATION CHARGED:
CHARGE NUMBER (If known):

SIGNATURE /s/Gerald D. Freeman DATE June 6, 1996

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974; Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below.)

1. *FORM NUMBER/TITLE/DATE. EEOC FORM 283, Intake Questionnaire, August 1987.*
2. *AUTHORITY. 42 U.S.C. § 2000e-5b, 29 U.S.C. § 211, 29 U.S.C. § 626.*
3. *PRINICPAL PURPOSE. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction.*
4. *ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation.*
5. *WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. The providing of this infomation is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.*

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement on reverse before completing this form.

☐ FEPA PCO # 9607-02343
☒ EEOC 15B960120 (c)

Clearwater Human Relations Department and EEOC

NAME (Indicate Mr., Ms., Mrs.) Mr. Gerald D. Freeman
HOME TELEPHONE *(include Area Code)* (813) 733-2053
STREET ADDRESS 2700 Bayshore Blvd., #5105
CITY, STATE AND ZIP CODE Dunedin, FL 34698
COUNTY Pinellas

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME Federal Express Corporation
NUMBER OF EMPLOYEES, MEMBERS 20+
TELEPHONE (including Area Code) (813) 736-6727
STREET ADDRESS 1881 Main Street
CITY, STATE AND ZIP CODE Dunedin, FL 34698
CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box (es))*

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☒ AGE ☐ RETALIATION
☐ OTHER *(Specify)*

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, year)*

April 22, 1996 & continuing

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s))*:

I. STATEMENT OF HARM:

I am being subjected to disparate treatment and harassed into voluntary retirement. I have been employed by Federal Express Corporation since September 27, 1982. My current position is Courier.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:

No reasons have been given.

III. STATEMENT OF DISCRIMINATION:

I believe that I have been subject to unlawful discrimination on the basis of my age (45) in violation of the Age Discrimination in Employment Act.

[DATE STAMP]

☒ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date July 8, 1996
Charging Party *(Signature)* /s/ Gerald D. Freeman

NOTARY - (When necessary for State and Local Requirements) /s/ [illegible]

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
/s/ Gerald D. Freeman

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS DATE (Day, month, and year) 08 Jul '96

[NOTARY SEAL]

STATE OF_____ CASE NAME_____
CITY/COUNTY OF_____ CASE NUMBER 15B970133

AFFIDAVIT

I, VINCENT J. MACCIA, being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affadivit may be subject to disclosure in accordance with Agency policy.

I am 52 years of age, my gender is male, and my racial identity is Caucasian.

My date of birth was Feb. 8, 1945. My Social Security number is 158-34-7178.

I reside at 216 Earl Street, City of Tarpon Springs, County of Pinellas, State of Florida, Zip Code 34689.

My telephone number is *(including area code)* 813-934-2914.

My complaint is against Federal Express Corporation which is located at 1881 Main Street, in Dunedin Florida 34698. Its telephone number is *(including area code)* 813-736-6727.

My job classification is *(if applicable)* Courier, My wage is $14.92 Per Hr.

My immediate supervisor is *(if applicable)* Edward Prough Manager Operations.

[DATE STAMP]

In my 35 years of employment, I have never witnessed such a radical change in a company's ethical standards as set forth by the Federal Express Corporation in the past three (3) years. These changes were orchestrated by Federal Express' Corporate headquarters in Memphis, Tennessee, to target their older work force, nationwide! No matter where my travels, in speaking with other Federal Express employees, in states such as, California, Georgia, Louisiana, Washington, Washington D.C., New York, New Jersey, Tennessee, Texas, Nevada, Illinois and within the state of Florida, they ALL displayed tbe same frustrations with the harassment tactics of management toward them and other senior employees. It's obvious, Federal Express' goals are to reduce their operational cost, rightly so, but not at the expense of their aging force. This shirking of responsibility by Federal Express has to stop, the older employees made Federal Express what it is today and the liabilities follow in payroll, medical claims, workman compensation claims and the threats of Unionization!

I'm making mention of unionization because it all ties in with Federal Express' tactical ploy to reduce their older work force. Talk of unionization started approximately 6 yeas ago in the Northeast with the United Auto Workers, UAW. However, serious threats started approximately three years ago with the UAW and most recent with the Teamsters through literature, stickers, meetings, etc., in the Southern region. Being aware of union activities, Federal Express, now had another reason for reducing their older work force. First, the older employee represented their most costly liability and secondly, a reduction in the older work force would minimize the threat of union organization. I've been

angered by the methods management has used to achieve their corporate goal, reduction of the older work force! The pit forms, used by management for: no van scans, missing POD'S, right day lates, wrong day lates, airbill errors, compliance numbers being off, etc. These are the tools management used to harass and/or build a profile against their older employees for future use, termination! I was harassed, victimized and discriminated against because of my age and affiliations with above mentioned unions. I became a TARGET!!

Since the departure of Senior Manager Mark Gaines and the arrival of the new senior manager, Terri Galloway, it was apparent that the employees/operations managers were going to change their ways or face disciplinary action and/or termination. Ms. Galloway stated at an AM meeting most employees would accept the "New" changes and the others would find these changes difficult. *(In with the new culture and out with the old culture.)* What she was referring to was the Best Practice Pays Program, and how it would benefit the harder working employee. Federal Express has disguised their BPP program as a tool for their employees to earn more moneys but in reality it may have benefited few. This program is a useful parameter for management to discriminate against their older employees. In previous years this writer attained above satisfactory evaluations being rewarded monetarily as well as the acknowledgment of doing a good job. Now, under this program, an older employee that once attained above average scores on his performance review, may well be just satisfactory or unsatisfactory facing termination. The older employee is working harder, making less money and not able to achieve a sense of accomplishment, as in the past, because of this BPP program.

After one of our senior couriers filed an EEOC complaint, Ms. Galloway at an AM meeting stated that a rumor has been going around that we are "out to get you" (Older Employees). She stated that the new goals and systems were not there to terminate older employees or force early retirement, in her next breath, she stated we would be held accountable for taking out the maximum number of Priority One stops and Mixed Stops, held accountable for Late Packages, held accountable for missing POD'S, (held accountable everything and anything that management could possibly use against you by inflating your pit form file!) Her message was clear, if you side with the rumors (new goals and systems are out to get older employees), you will be held accountable. Our senior manager's presence fit Federal Express' new image, "Best Practice Pays" no matter how you get the job done, but reducing the cost of labor via intimidation/termination was their true agenda.

There were two reasons why this AM meeting stuck with me; one, I had originally told the courier who filed the EEOC complaint that I would be a witness for him. I wondered for a long time about how confidential the process was and secondly, when the meeting was over, my senior manager, Ms. Galloway approached me on the sort belt and wanted to speak with me in front of my van. Of course her headset was on just in case I said something derogatory, she would have witnesses at the other ends of the headsets. The conversation started with her asking me "I understand you may be interested in part time?" I stated that I considered it four years ago but it would not be advantageous in regards to the benefits I would lose. She stated "Oh no" the only benefit you would lose would be if you were injured off the job, "that's all". Look into it and get. back with me." More lies, that was not the only benefit I would lose nor did I appreciate being singled out. (I spoke to ops manager Ardy Piazza

some four years ago about part time status) I was again angered and frustrated over the fact she never approached younger employees with this offer of part time status, more discrimination/harassment!!

It also amazes me how the Sunshine District under the leadership of Marco Chan, changed the 90 day company work rule to 30 days, whereas if you are sick or injured and exceeded that 30 day period you were displaced from your route, unless you submitted a letter, and awarded a 15 day extension. This Sunshine District rule has since spread to the Southern region and probably elsewhere by now. The company rule still remains at 90 days. How is an older employee supposed to heal faster than a younger employee? In most cases, the younger employee would heal faster or go back injured in fear of losing his/hers route. Intimidation works! This goes hand in hand with putting additional pressure on older couriers, making continued employment at Federal Express look that much more unlikely and hopeless.

Federal Express is now hiring more casual employees then in the past, whereas it was common practice to hire permanent part-time and eventually upgraded to full time within three months or sooner. It now takes years before a part time permanent employee is upgraded to full time. Why upgrade a part time employee when management can work a part timer 50/55 hours weekly when most full time employees are struggling to reach 35/40 hours. This practice is condoned by local management as well as upper management rather then paying a senior full time employee wages. I guess loyalty plays a small part in this rapidly changing company!!

Not only are we being intimidated, but our managers are being intimidated to intimidate us or else!

Ms. Galloway has always demonstrated all the qualities of an autocratic leader, especially when it came to my manager at the time, Ardy Piazza. This writer was pitted by Mr. Piazza for not being able to recall going from stop 40 to 41 without making several stop in-between, making the mapping of this particular route unproductive. Mr. Piazza failed to follow instructions in regards to pitting someone for this mapping check. First, it was imperative that he have a copy of this writers delivery record present to check that a delivery wasn't made in-between the mapped recorded stops. This is possible when the airbill is scanned, for whatever reason and not the astra sticker. This tracking system was in its infancy stages, being worked on by a. co-worker, who advised me of the flaws. To add to this in-accurate and deceitful pitting was the fact that the day in question was twenty-eight (28) days earlier from the day I was pitted! I signed Mr. Piazza's pit form- knowing he was coerced into doing this by Ms. Galloway. I've worked for and with Ardy Piazza since I started with Federal Express, that being Nov. 19, 1984. In all the years, I know this cowardly act was uncharacteristic of Mr. Piazza. I was hurt and angered at the same time to think a thirteen year working relationship had deteriorated over the threats by one person, Ms. Galloway. Mr. Piazza was in fear of losing his job! He mentioned this to me several times, possibly in atonement for his unusual behavior. However, the fact remains, my rights were violated, I was discriminated against by Mr. Piazza for the sake of following Ms. Galloways orders and Federal Express' tactics of forcing the older employee to downgrade or quit.

Another incident, involving operations manager Lou Fusco. This writer was approached by Lou Fusco on the sort belt, at which time he stated he would like to speak with me in regards to an accident. I followed Mr. Fusco to the front of my van as he adjusted his headset

and making sure it was turned on. He stated to me that I would have to make out an accident report in regards to a puncture in the side wall of my spare tire. I stated that I had no knowledge of my spare tire having a puncture in it. I advised him that I would not make out an accident report and be charged for something someone else did. Mr. Fusco stated that it was Federal Express' policy to make an accident report out of this. I asked Mr. Fusco if he checked my vehicle inspection report from the previous day, to which he answered "yes". Well the report indicated that everything was okay with my vehicle prior to my departure and that someone else must have driven my vehicle afterwards. I stated that my vehicle shows a full tank of gasoline and that the people who gas and/or washed my vehicle must be responsible. Mr. Fusco's answer to me was "But they are not Federal Express employees." I stated that they didn't have to be Federal Express employees to have an accident or to have damaged my spare tire. Mr. Fusco was showing signs of losing his patience with this seesaw verbal confrontation and stated he was going to check further with Larry the mechanic in regards to the spare. Approximately ten minutes later Mr. Fusco returned and stated to this writer that the spare in question did not belong to this writers van and was in my van apparently by mistake. No apologies made, he walked off as if nothing had happened. This is an example of many incidents that took place in an attempt to weaken the morale of many older employees. These types of incidents occurred daily in an attempt to break down the targeted employees. This incident could have been avoided knowing the capabilities of Mr. Fusco and the Clearwater Management Team, in regards to investigating before accusing. Their real intention here was to intimidate and frustrate this writer into saying something derogatory in an attempt to charge me with insubordination. Also, this was another step that management took in trying to build a profile against a

senior employee as Federal Express's policy is "Three accidents within an eighteen month period is grounds for termination."

Ms. Galloway has on numerous occasions, harassed many older employees with the belt sort. For example, she told me to make sure after sorting the freight into their respected vans, to go through three baskets of documents checking for mis-sorts. After sorting two of the baskets for routes 111 and 163, this writer returned to his van in an attempt to sort his basket That's when Ms. Galloway would appear and state "Why are you still here? You have to leave the building!" Attemptmg to explain the reasons for the delayed building leave time, she would repeat herself and ask the same question. "Why are you still here?" These were unrealistic tasks that could not be completed in the time allotted and she knew this. Month after month of this treatment paid dividends for Federal Express, some employees sought counseling through "Peoples Help" while others chose other employment rather then being harassed further and others transferred out. Every day this writer was challenged mentally as to whether this would be his last day. What surprises would the tactful Ms. Galloway have in store for me today? What did I do wrong today? Will I ever be able to do anything right for Federal Express? Will she/they ever let up? How much more stress can I endure? These were the questions that went through most of the senior employees minds every day. It was a daily hostile environment full of mental and physical harassment.

There is one more point I would like to touch on before my conclusion of this affidavit. I was hired by Federal Express on November 19, 1984, at which time I was 39 years of age. Federal Express was a young, flourishing company on the way up and readily defended

by it's employees, as a great company to work for. However, almost 14 years later, at age 52, Federal Express has been taking a long look at their aging work force for which they have made no provisions.

Case in point, Federal Express has a program called Survey Feedback Action (SFA). This program is a survey given to Federal Express employees to ascertain what their feelings are in regards to local and upper management. Certain percentages are attainable: favorable, fav/unf, unfavorable and no answers. These percentages are accumulated, screened and discussed by the employees and management. This is done to develop better working procedures, a better understanding of goals and to bring together both the employee and management to understand each others concerns. Well, this SFA survey is given annually and the questions are the same, at least since my hiring in 1984, to the present day of 1997. The question I'm concerned is Number 15, which states "CAN BE SURE OF A JOB IF I DO GOOD WORK". In 1994 the favorable line indicated 52 percent, in this years survey the percentage dropped to 33 percent, a drop of 19 percentage points, with approximately five senior employees not taking the survey. This indicates to myself and any co-workers that even if you are doing a good job, with present day management building a profile on you, you are not guaranteed a job. I know that I have performed a good job up till now, however, with the profiles being built on me and every other senior employee, question number 15 will be on a steady decline. Every employee 40 years of age or older with 10 or more years of service are being focused on by management of Federal Express Corporation.

In conclusion to my age discrimination affidavit, the mentioned incidents can and will bc substantiated when necessary. Although these mentioned incidents are

discriminatory in nature, the insensitivity to which Federal Express imposed their will, should not go unnoticed. Rather then managing their senior employees, Federal Express chose that policing them would be faster and easier in attaining their goal, downsizing their aging work force! This autocratic form of management had an adverse effect on morale of many of my co-workers, myself included. If you were an older employee and didn't agree with Federal Express philosophy of People, Service, Profit you were labeled a trouble maker and/or had a attitude problem! The purpose of this labeling was to isolate the more enlightened work-related employee from the newer, gullible employee.

It is this writers conclusion, of the facts stated above, Federal Express Coporate Headquarters in Memphis blueprinted a plan to all Region Heads instructing District and Local Management how they were to avoid unionization at all cost! It is also this writers conclusion, of the facts stated above, Federal Express Corporate Headquarters blueprinted a plan to all Region Heads instructing District and Local Management how they were to avoid the costly issue of an aging work force! It is this writers conclusion, of the facts stated above, that to acheive this plan, your aging and senior employees rights were violated by the continued victimization, harassment and the misappropriation of authority by management! Addressing these issues are the only assurance that a reoccurrence of this doesn't repeat itself when the next generation of employees enters into the 40 plus age group or reach 10 or more years of service.

I have read and had an opportunity to correct this Affidavit consisting of 6 handwritten ☐ typed ☒ pages and swear that these facts are true and correct to the best of my knowledge and belief.

/s/ Vincent J. Maccia

Before me, the undersigned authority personally appeared Vincent J. Maccia who being duly sworn, says under oath that the matters and facts set out in the above document, consisting of 6 pages, are true and correct to the best of his/her belief.

Sworn to before me, the 4th day of September, 1997 by Vincent J. Maccia, who has produced personally known as identification.

My Commission expires: [NOTARY SEAL]

/s/ Lois A. Guarino
(Notary Public)

No. 04-320

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY W. BOST, *et al.*,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision that a plaintiff's Intake Questionnaire and affidavit do not constitute a timely charge in the absence of proof that the plaintiff or the EEOC manifested any intent that the questionnaire should be treated as a charge to activate the EEOC's administrative processes is consistent with decisions of this Court and with decisions of other courts of appeals.

2. Even if the Court determines that the first question presented by the Petitioners is appropriate for review, the additional questions presented by the Petitioners should not be reviewed because they were neither presented to nor decided by the Court of Appeals or the District Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Federal Express Corporation, is wholly owned by FedEx Corporation.

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Respondent Federal Express corporation (hereinafter "FedEx" or "Respondent") hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case skims over and omits facts that are significant to the decision of the Court of Appeals.

1. *The Freeman Litigation.*

The first version of this case was originally initiated in a separate case on October 26, 1999, by plaintiffs Freeman, Maccia, Clausnitzer, Creamer and Krolman (hereinafter the "*Freeman* plaintiffs"). Petition at A-3. In that case, the *Freeman* plaintiffs challenged policies implemented by FedEx in 1994 and 1995 as violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* Petition at A-5. By order entered September 25, 2000, the district court dismissed that complaint for failure to comply with Rule 8 of the Federal Rules of Civil Procedure, but granted the plaintiffs twenty days in which to file an amended complaint. Petition at A-14. The district court also denied the *Freeman* plaintiffs' class claims as moot. Petition at A-29.

Rather than file an amended complaint, the *Freeman* plaintiffs elected to appeal the dismissal to the Eleventh Circuit Court of Appeals. Petition at A-4. On January 14, 2002, the Eleventh Circuit affirmed the dismissal of the *Freeman* complaint and concluded that dismissal of the complaint was final because no amended complaint was filed within the time allowed by the district court. Petition at A-4.

On March 28, 2002, the district court entered an order directing administrative closure of the case on the ground that its September 25, 2000 order became final on October 23, 2000 when the *Freeman* plaintiffs did not file an amended complaint. Petition at A-4. The *Freeman* plaintiffs did not appeal that order.

2. *Proceedings in the District Court.*

On December 18, 2001, while the *Freeman* appeal was pending, Petitioner Bost — represented by counsel — completed an intake questionnaire and affidavit in which he made allegations of discrimination by FedEx and submitted these documents to the EEOC. Petition at A-3-4; A-69. The intake questionnaire specifically represented that it did not constitute a charge: "Information provided on this form will be used by the Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate." The intake questionnaire also stated that its purpose was to "solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction." Petition at A-67-68. Petitioner Bost has never presented any evidence that he or his counsel had any communications with the EEOC regarding any investigation by the EEOC or the effect of the intake questionnaire or affidavit. The EEOC did not serve the intake questionnaire or affidavit on FedEx. *See* A-24.

On May 9, 2002, this suit was initiated by the *Freeman* plaintiffs, Bost and four other Petitioners who admittedly never filed any charge of discrimination prior to filing suit

(hereinafter collectively referred to as the "Petitioners"). In the complaint, the Petitioners alleged that FedEx had adopted policies in 1994 that "were intended to and did operate to reduce the number and percentage of couriers over the age of forty by treating them less favorably than younger couriers."[1] Complaint, ¶ 12 (Petition at A-46). On June 5, 2002, one month after the suit was commenced, Petitioner Bost filed a charge of discrimination that was served on FedEx. Petition at A-18.

FedEx moved to dismiss the complaint on the ground that the Petitioners did not file their suit within ninety days of receipt of a notice of right to sue, as required by the ADEA.[2] Rather, the latest notice of right to sue issued to any of the Petitioners was that issued to Freeman on September 15, 1999, over two and a half years prior to commencement of the action. *See* Petition at A-3. FedEx further argued that, in the absence of timely charges by the *Freeman* plaintiffs, the other Petitioners who had not filed any charges of discrimination were not entitled to "piggyback" on the *Freeman* plaintiffs' charges under the "single filing" rule. In response, the Petitioners asserted for-

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1. None of the Petitioners was terminated in one reduction-in-force or exit incentive program implemented by FedEx, as is typically the case in a collective action. Three Petitioners have been involuntarily terminated by FedEx, and not all for the same reason. Three other Petitioners voluntarily resigned their employment, and did so over a three and a half-year period. One Petitioner retired. Four still work at FedEx.

2. Under the ADEA, a plaintiff may commence a court case as early as 60 days after filing a charge of discrimination or as late as 90 days after receiving a right-to-sue letter. 29 U.S.C. § 626. (The Petitioners incorrectly refer to it as 29 U.S.C. § 628).

the first time that Bost's December 2001 intake questionnaire constituted a "charge."[3]

The District Court granted FedEx's motion, holding that neither Bost nor the *Freeman* plaintiffs had filed valid and timely charges on which other Petitioners could "piggyback." The District Court also dismissed the Petitioners' state law claims as untimely under the Florida Civil Rights Act. *See* Petition at A-35-36.

3. *Proceedings before the Eleventh Circuit Court of Appeals.*

On appeal, the Petitioners, in their brief, raised three issues:

> (1) Under the Valid Regulation of EEOC, Bost's Completed Questionnaire and Affidavit Constituted a Valid Charge When it was Filed with EEOC in December 2002 [sic];
>
> (2) The District Court Erred in Dismissing the State Law Claims with Prejudice and in Failing to Recognize that 28 U.S.C. § 1367(d) Tolled the State Statute of Limitations; and
>
> (3) The District Court Erred in Holding that Dismissal, with Prejudice, of the Complaint in

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3. In the complaint, the Petitioners did not allege that Bost had filed a "charge," but rather stated that he brought suit more than 60 days "after he notified" the EEOC "of his charges that Federal Express had been engaged in discriminatory employment practices against older couriers." Petition at A-52 (Complaint, ¶ 28).

> Freeman, et al. v. Federal Express Barred the Freeman Plaintiffs from Asserting ADEA and FCRA Claims in this Case.

The Eleventh Circuit separately addressed whether the Bost Petitioners and the *Freeman* plaintiffs could "piggyback" under the single-filing rule to satisfy the exhaustion requirement. As the Court of Appeals explained,

> [u]nder the piggybacking rule, a putative plaintiff who has not filed an EEOC charge . . . may rely upon the claim of a plaintiff who has filed a timely charge. The piggybacking rule applies to ADEA cases. A plaintiff may piggyback on another plaintiff's charge provided (1) the relied upon charge is not invalid, and (2) the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame.

Petition at A-8 (citations omitted). The validity and timeliness of any charges filed by Bost and Freeman were therefore determinative of the claims of the other Petitioners.

As to the Bost Petitioners, the Eleventh Circuit held that Bost's December 2001 submission did not constitute a "charge" because the EEOC did not treat the submission as a "charge," and because the intake questionnaire itself did not suggest that it was a "charge." Petition at A-12-13. Additionally,

> There is no evidence that Bost manifested an intent to activate the administrative process by filing his intake questionnaire with the EEOC, as

> *Wilkerson* required. The undisputed evidence instead shows the opposite: Bost clearly understood that the intake questionnaire was not a charge because he later filed a timely charge. If Bost believed that he had filed a charge of discrimination when he filed the intake questionnaire, he would not have filed an additional timely charge of discrimination. Bost's conduct shows that he did not intend to activate the administrative process until he filed his formal charge of discrimination.

Petition at A-12.

Because Bost did not file a charge before filing suit, he did not comply with the ADEA's exhaustion requirements and his ADEA claim, as well as the ADEA claim of the Bost Petitioners, failed as a matter of law. Petition at A-13.

The Court of Appeals also concluded that the ADEA claims of the *Freeman* plaintiffs failed. The last right-to-sue letter to any of the *Freeman* plaintiffs was issued on September 15, 1999. The original action initiated by the *Freeman* plaintiffs was dismissed on September 25, 2000, with instructions to amend the complaint by October 23, 2000. When the *Freeman* plaintiffs failed to amend their complaint by that date, the involuntary dismissal of their complaint became an adjudication on the merits. Petition at A-14 (citing *Robinson v. Fed. Nat'l Mortgage Ass'n*, 673 F.2d 1247, 1249 (11th Cir. 1982)). The statute of limitations began to run at that time and expired before this suit was filed on May 9, 2002, 604 days later. *Id.* Additionally, the *Freeman* plaintiffs did not offer any explanation for their

delay in filing suit that would support revival of their complaint through equitable tolling. Petition at A-15.

The Court of Appeals also affirmed the District Court's dismissal of the Petitioners' state law claims. The Petitioners did not assert those arguments before the District Court until their supplemental motion to alter or amend the judgment. The Court of Appeals held that that District Court's denial of the motion to alter or amend was not an abuse of discretion. Petition at A-15-16.

REASONS FOR DENYING THE PETITION

As to the first issue presented by the Petitioners, the Petition should be denied because the decision of the Court of Appeals is consistent with decisions of this Court and other courts of appeals. Any perceived conflict among the courts of appeals is reconcilable on the facts of each case. As to the additional issues presented by the Petitioners, the Petition should also be denied because those issues were neither presented to nor decided by the Court of Appeals.

1. *The Eleventh Circuit's Decision is Consistent with Decisions of this Court and other Circuits.*

According to the Petitioners, four or five circuits treat any written submission to the EEOC that identifies an employer and describes some discriminatory conduct as a "charge." This assertion mischaracterizes the rulings of those circuits and also is inconsistent with this Court's decision in *Edelman v. Lynchberg College*, 535 U.S. 106 (2002). In the end, there is no conflict among the circuits, only reconcilable decisions that logically reach different results based on different facts.

Contrary to the Petitioners' representations in the Petition, this Court's decision in *Edelman* does not compel rejection of the "manifest intent" approach of the Eleventh Circuit. In *Edelman*, the plaintiff submitted an unverified statement of his allegations of discrimination to the EEOC soon after he was denied tenure. When the plaintiff's interview with the EEOC was delayed, his lawyer advised the EEOC of his understanding that the delay "will not compromise the filing date." The plaintiff thereafter completed a verified charge of discrimination 313 days after he had been denied tenure. The issue before this Court was the validity of the EEOC's regulations that permitted an otherwise timely filer to verify a charge after the time for filing has expired.[4] This Court confirmed the validity of that regulation.

That determination, however, did not finally resolve the plaintiff's claim; this Court expressly did not reach the district court's conclusion that the plaintiff's letter "was not a charge under the statute because neither he nor the EEOC treated it as one." 535 U.S. at 119. In other words, this Court implicitly recognized that not all written submissions to the EEOC that identify an employer and describe some discrimination are intended to constitute a "charge." On remand, the court of appeals determined that the plaintiff did treat the letter as a charge, based in part on his attorney's written determination to maintain the filing date.

Therefore, *Edelman*, standing alone, refutes the Petitioners' assertion of a conflict among the circuits that warrants this Court's review of the Eleventh Circuit's

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4. The challenged regulation was 29 C.F.R. § 12626.8 which is set out in the Petition at pages "c" and "d."

decision. Under *Edelman*, the Eleventh Circuit appropriately and properly considered how the EEOC and Bost treated the submission to the EEOC.[5] To the extent that any circuit holds that consideration of those circumstances is not appropriate, it is inconsistent with *Edelman*. That approach is further supported by strong policy considerations. As the Petitioners pointed out in the Petition, the EEOC considers more than 80,000 charges each year. Petition at 12. Under the Petitioners' position, that number would exponentially increase because the EEOC would be required to investigate and attempt to conciliate every written statement of discrimination that was submitted to the EEOC.

Moreover, the cases cited by the Petitioners also demonstrate that all circuits consider the facts surrounding a plaintiff's submission to the EEOC in determining whether a submission constitutes a charge.[6] For example, the Fourth Circuit clearly considered those facts when deciding *Edelman* on remand. In *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982), the Fifth Circuit determined that an unverified charge was sufficient because it "informed the EEOC of the identity of the parties and described the alleged discriminatory conduct in enough detail to enable it to issue

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5. The Eleventh Circuit's determination was based on undisputed facts that do not support an inference that Bost intended his questionnaire to constitute a charge of discrimination. Even now, the Petitioners do not challenge those facts or make any claim that the facts can be construed to show that Bost did intend his questionnaire to constitute a charge. Their only argument is that all such facts are irrelevant as a matter of law.

6. Additionally, most of the cases cited by the Petitioners as constituting a conflict among the circuits were decided before this Court's decision in *Edelman* in 2002.

an official notice of charge to [the defendant], thus setting the administrative machinery in motion." *Id.* In *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974), even though the union claimed that it never received notice of charges filed by the plaintiffs, the Sixth Circuit held that the district court properly exercised jurisdiction because the union participated in conciliation discussions and the EEOC records showed that the union was named in the charges. *See Williams v. General Electric Co.*, 269 F. Supp. 2d 958 (S.D. Ohio 2003) (adopting "manifest intent" test). In *Sanders v. Culinary Workers Union Local No. 226,* 804 F. Supp. 86 (D. Nev. 1992), a District Court (affirmed by the Ninth Circuit) determined that an intake form submitted by a plaintiff who may have been represented by counsel did not constitute a charge, especially when the union never received notice of the claim until after the expiration of the 300 day limit. Therefore, any conflict among the circuits is simply factual in nature, not any conflict of applicable legal principles.

In summary, the Petition should be denied with respect to the first issue presented for review by the plaintiffs.

2. *The additional questions presented for review by the Petitioners were not presented to or decided by the Court of Appeals.*

In their Petition, the Petitioners identify two additional issues that are purportedly related to the first issue presented for review. Petition at i. Neither of those issues, however, was presented to or decided by the Court of Appeals and are not appropriate for review on certiorari. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

The argument section of the Petition that corresponds to the two additional issues appears to address only the tolling of the statute of limitations when a class is limited or decertified. Petition at 17-20. No class, however, was ever certified in this case or in the *Freeman* case. Additionally, the statement of issues presented to the Court of Appeals by the Petitioners demonstrates that these issues were not raised before the Court of Appeals. In fact, the argument section seems to challenge decisions of the Eleventh Circuit in other cases, not this one. *See, e.g.*, Petition at 18, n.5 (representing that conflict exists between opinions of Second and Third Circuits with opinions of the Eleventh Circuit decided in 1994 and 2001); Petition at 19-20 (conflict between opinions of Second and Third Circuit and opinions of Eleventh Circuit decided in 2001 and 1998).

The Petition should therefore be denied with respect to the additional issues presented for review.

CONCLUSION

Therefore, the Petition should be denied in its entirety.

Respectfully submitted,

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No. 04-320

In The Supreme Court of the United States

ANTHONY BOST, ET AL.,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

1. Although three courts of appeals, including the Eleventh Circuit in a decision relied upon in the decision below, have recognized the conflict among them,[1] the Brief in Opposition of Federal Express Corp. asserts that the decision of that court below is consistent with the decisions of other circuits, and argues "the decision in *Edelman v. Lynchburg College,* 535 U. S. 106 (2002), refutes the Petitioners' assertion of a conflict among the circuits..." Brief in Opp. at 8-9. Yet, this Court in that decision decided only that the EEOC regulation is authorized and valid, expressly remanded to the Fourth Circuit for a decision on the employer's argument "that Edelman's letter was not a charge under the statute because neither he nor the EEOC treated it as one." 535 U.S. at 118-119. See Brief in Opp. at 8. On that issue, the courts of appeals are still in conflict. Pet. 10-12 and fn. 2 and 3.

The Brief in Opp. contains only a side reference to the regulations of the EEOC (Brief In Opp. at 8 and fn. 4, and does not contain the citation to the decision of the Fourth Circuit on remand in *Edelman v. Lynchburg College,* 300 F.3d 400 (4th Cir. 2002), although the only appellate decisions subsequent to this Court's ruling are that one and the decision of Eleventh Circuit below in this case, and the Petition shows the conflict between them. Petition at 10-12. In the decision below, the Court of Appeals for the Eleventh

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[1] The Court of Appeals below cited and adhered to its earlier decision in *Pijenburg v. West Georgia Health Systems, Inc.,* 255 F.3d 1304 (2001). Pet. A-10, 13. The pre-existing conflict was recognized in that decision at 255 F.3d at 1305. That conflict was also recognized in *Diez v. Minnesota Mining & Mfg. Co.,* 88 F.3d 672, 674-674 (88th Cir. 1996); and *B.K. B. v. Maui Police Dept.,* 276 F.3d 1091, 1102, fn. 2 (9th Cir. 2002).

Circuit acknowledges that the applicable EEOC regulations provide that charges "'must, at a minimum be in writing and name the prospective respondent and ...and generally allege the discriminatory act(s).'" (Pet. A- 7-8); but it holds that a writing in the form of an intake questionnaire and affidavit is not a "charge" within the meaning of the law, because "there is no evidence in the record that EEOC did anything in response to Bost's intake questionnaire and affidavit... of any misleading communication between Bost and EEOC" and because "an intake questionnaire is not intended to function as a charge." Pet. A-10 and 11.

By contrast, the Court of Appeals for the Fourth Circuit recognized that the regulation of the EEOC is governing. *Edelman v. Lynchburg College, supra,* 300 F.3d at 404-405; Pet. at 11-12. There is a recent conflict between the courts of appeals of the Eleventh and Fourth circuits, in addition to the longstanding conflict among the courts of appeals recognized by at least three courts of appeals. Pet. at 12.

That decision of the Fourth Circuit quotes from the language of the valid regulation of the EEOC, 29 C.F.R. 1601.12(b), and rejects the argument of the employer that "because EEOC did not assign it an EEOC number, forward a copy to the College..." or otherwise treat it as a charge, the first unsworn document was not a "charge." 300 F.3d at 404; Pet. at 11-12. It ruled that "The problems noted by the College are not deficiencies in the charge; they are failures of the EEOC to carry out its responsibilities" under the law. *Id.* 300 F.3d at 404-405. It therefore rejected the argument adopted by the Court below that EEOC's failure to carry out its responsibilities rendered the document a non-charge under the Act. See App. A-9-13.

A conflict between or among the U. S. courts of appeal is itself grounds for granting review. Rule 10(a), Rules of this Court; *Edelman v. Lynchburg College,* 535 U.S. 106, 111 and fn.4 (2002); and *Chevron v. Echazabal,* 536 U. S.

73, 76 (2002:); *Clackamas Gastroenterology Associates v. Wells,* 538 U. S. 440, 444 and fn. 3; 124 S. Ct. 1236, 1240 (2003); *General Dynamics Systems, Inc. v. Cline,* 540 U. S. 551, 124 S. Ct. 1236, 1240 (2004). Review under Rule 10(a) is appropriate. *Id.*

Petitioners agree with Respondent Federal Express that this Court "expressly did not reach" the question of whether EEOC's failure to give notice and otherwise treat the first writing as a charge, even though it satisfies the standards if the regulations of a "charge," deprives that document of its status as a "charge" under Title VII and the ADEA. Brief in Opp. at 8. *Edelman v. Lynchburg College,* 535 U.S. at 119. See, Pet. at10-11. Indeed, it is for that reason the Petition is based upon Rule 10(a) of this Court rather than Rule 10(c).

Respondent Federal Express acknowledges that EEOC receives "more than 80,000 charges a year" but it asserts that the number of charges "will exponentially increase" if the Petition is granted and the decision below is reversed. Brief in Opp. at 9. That statement suggests that many more initial writings of charging parties are received by EEOC and its cooperating agencies than are treated as charges. If true that statement would support a grant of the petition, because the charge filing procedures are designed to enable lay persons to submit complaints which will cause EEOC to give notice to employers and permit conciliation. See Pet. at 13-14; *EEOC v. Commercial Office Products Co.,* 486 U. S. 107, 123-124 (1988); *Oscar Mayer & Co. v. Evans,* 441 U. S. 750, 761 (1979).

In any event, at least four and probably five of the courts of appeals have decisions in conflict with the decision of the court of appeals below. Pet. at 11, fn. 2, and *EEOC v. Sears Roebuck and Co.,* 650 F.2d 14, 18 (2d Cir. 1981); and *Hodge v. The New York College of Podiatric Medicine,* 157

F. 3d 164 (2d Cir. 1998)(ADEA). Those five courts of appeals have already adopted the position advocated by the petitioners here, and they include some of the states with the largest number of inhabitants and employees. It is unlikely that there will be any substantial increase in the number of cases docketed by EEOC, but if there is any increase, it would further the intent of Congress.

Respondent Federal Express states that "all circuits consider facts surrounding a plaintiff's submission to EEOC in determining whether a submission constitutes a charge." It states that "The Fourth Circuit clearly did so" in *Edelman v. Lynchburg College, supra.*

While it is true that the Fourth Circuit in that case considered the circumstances of the writing of the initial letter it held to be a charge, it did not rule on the basis of intent or the corresponding case law. Instead, after quoting the language of the EEOC's regulation, the Court in that case noted that "The College does not challenge the status of the November 14 letter as a charge on the basis of its substantive content" and ruled that "the simple failure by the EEOC to carry out its statutory duties does not precludes a plaintiff's Title VII claim" *supra*, 300 F.3d at 404. The decision below is in conflict with the holding of the Fourth Circuit, 300 F.3d at 404-405.

The Fifth Circuit precedent cited under the ADEA in the Petition was *Foster v. National Bank*, 857 F.2d 1058 (1988). Pet. at 11. In that case, the charging party sent EEOC a short letter stating that Foster intended to bring a suit against the defendant Bank because he believed that he was discharged because of his age. The employer argued that the letter was not a charge, but the Fifth Circuit cited and quoted from the letter and the EEOC regulation under the ADEA, holding that the plaintiff had filed a "charge" because the document he filed with EEOC identified the parties and the kind of discriminatory practice alleged, as

required by the regulation, 29 C.F. R. 1626.6 and 8, *Foster v. National Bank, supra,* 857 F.2d at 1060. The Petition's assertion at 11, fn. 2 that there is a conflict between the decision below and the rulings of the Fifth Circuit and the Sixth Circuit is accurate.[2]

2. Respondent Federal Express has been on notice at least since October 1999 of the allegations of its couriers that it has engaged in a nation wide pattern of age discrimination against its couriers over the age of 40; and. placed on notice of Petitioner Bost's claims of such discrimination no later than early March 2001. Pet. at 5-6.

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[2] Federal Express also seeks to distinguish the decision of the Fifth Circuit in *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982); and *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (Sixth Cir. 1974) on the ground that the court there discussed "the facts surrounding a plaintiff's submission to the EEOC. " Brief in Opp. at 9 and 10.In the *Price* case in the second paragraph of its discussion of the "Sufficiency of Charge" the Fifth Circuit cited and quoted from the regulation of the EEOC, 29 C. F. R. 1601.12(b). *Price, supra,* 687 F.2d at 77. It cited earlier Fifth Circuit precedent, including *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 462 (1969). Similarly, in *Price, supra,* the Fifth Circuit ruled that "... the form completed on January 10, 1979....informed the EEOC of the identity of the parties and described the alleged discriminatory conduct in enough detail to enable it to issue an official notice of charge, thus setting the administrative machinery in motion." 408 F.2d at 78. Similarly, the Sixth Circuit has long held that "He and the members of his class, should not be denied judicial relief because of circumstances beyond his control." *Thornton v. East Texas Motor Freight Co.*, 497 F.2d 416, 424 (6th Cir. 1974). Those cases are contrary to the decision below which holds that the failure of EEOC to perform it's duty to notify the employer Federal Express does deprive petitioners of the opportunity to obtain relief because of the EEOC's failure to provide the employer with notice of the charge. Pett. A 9-13

Yet the court of appeals ruled in effect that such notice was insufficient to toll the period of limitations. Pet. A 13-15. That ruling is incompatible with the decisions of courts of appeals for the Second, Third, Sixth and Tenth Circuits. Pet. 17-20. If the Court grants review on Question 1, it should also grant review on Question 2.

Federal Express argues that review should not be granted on Question 2,, because "no class was ever certified in this case or in the *Freeman* case." Brief in Opp. at 11. However, the ADEA, like the Fair Labor Standards Act, provides for a statutory right to a collective action by employees, and is not dependent on or governed by Rule 23, Fed. R. Civ. P. For that reason, if the defendant employer is placed on notice of an allegation of company wide age discrimination, any member of the class may join an existing suit or commence his own without the need to file additional charges. E. g., *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990); *Howlett v. Holiday Inn s Inc.*, 49 F.3d 189, 194 (6th Cir. 1995); *Foster v. Ruhrpumpen, Inc.* 365 F.3d 1191,1197-1198 (10th Cir. 2004).

For the reasons set forth in the Petition, and above, the Petition should be granted.

Respectfully submitted,

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